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# ONTARIO LABOUR RELATIONS BOARD REPORTS



**October 1985**



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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1985] OLRB REP. OCTOBER**

**EDITOR: NIMAL V. DISSANAYAKE**

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**1210-85-R** Canadian Union of Operating Engineers and General Workers, Applicant, v. **Abex Industries Ltd. Friction Products Division**, Respondent, v. United Steelworkers of America, Intervener

**Bargaining Unit - Displacement application seeking to carve out group from incumbents's unit - Not claiming craft status - Inadequate representation alone not justifying carve out**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *W. H. Wightman* and *P. J. O'Keeffe*.

**APPEARANCES:** *Michael O'Malley*, *Al Giason* and *Claude Middleton* for the applicant; *Kenneth Ashton* and *Peter C. Milner* for the respondent; *Brian Shell* and *Winston Curtis* for the intervener.

#### **DECISION OF THE BOARD;** October 29, 1985

1. This is an application for certification in which the applicant requested that a pre-hearing representation vote be taken. The Board, differently constituted, issued a decision September 5, 1985 in which it directed the taking of a pre-hearing vote as requested. The vote was taken on September 10, 1985 and, by direction of the Board, the ballot box was sealed and the ballots not counted pending further direction by the Board.

2. The reason for the Board directing that the ballot box be sealed and the ballots not counted was because of an apparent dispute between the parties about whether the bargaining unit sought by the applicant was a unit of employees appropriate for collective bargaining. The Board's decision of September 5th describes the dispute in the following terms at paragraph 4:

The applicant seeks to displace the intervener as the bargaining agent for a unit of stationary engineers and maintenance personnel. Those employees are currently part of a larger plant wide bargaining unit represented by the intervener, pursuant to a collective agreement between the respondent and intervener which expires on October 7, 1985. It appears that both the respondent and intervener are opposed to the "carve-out" of the bargaining unit sought by the applicant from the larger plant wide bargaining unit....".

A hearing of the application was scheduled in order to deal with this dispute.

3. When the application came before the Board as constituted herein, the Board heard the submissions of the parties on how it should proceed with the issue. Part of the intervener's submissions were that the Board should dismiss the application unless the applicant could satisfy the Board that there was good and sufficient reason for the Board to depart from its policy respecting applications for certification in which one trade union seeks to displace the bargaining rights of another. During the course of the applicant's submission, the applicant advised the Board that the employees which it was seeking to represent were employees in the bargaining unit described in the collective agreement between the respondent and the intervener and that the applicant was not seeking a craft unit within the meaning of section 6(3) of the *Labour Relations Act*.

4. After receiving the full submissions of the parties, the Board recessed the hearing to review and consider those submissions. When the Board reconvened the hearing, it rendered the following oral decision which is hereby confirmed:

The applicant is seeking by way of this application to represent approximately nine employees of the respondent engaged in maintenance work. They are amongst 149 employees of the respondent presently represented in collective bargaining by the intervener United Steelworkers of America. It is common ground amongst the parties that the nine employees do not constitute a craft bargaining unit. The applicant advises the Board that it is not seeking an appropriate bargaining unit under section 6(3) of the *Labour Relations Act*, rather it is seeking an appropriate unit under section 6(1) of the Act.

An application for certification made when there is an incumbent trade union representing in collective bargaining the employees affected by the application, is referred to by the Board as a displacement application. The Board normally requires a displacement applicant to take all of the employees in the existing bargaining unit described in the collective agreement between the employer and the incumbent trade union. See *Toronto Star Limited*, [1974] OLRB Rep. July 416 at p. 416. That is because of the Board's concern to preserve the integrity and viability of established bargaining units. When an applicant seeks to carve out part of an established bargaining unit, it must have compelling reasons why its unit would be appropriate if it is going to overcome the strong presumption in favour of the established unit.

The only reason advanced by the applicant herein as to why the proposed bargaining unit would be appropriate, is that the employees believe they have not been adequately represented by the intervener. That reason standing alone is insufficient reason for the Board to depart from its policy of requiring a displacement applicant to take all of the employees in the unit described in the collective agreement between the intervener and the respondent; to disrupt the *prima facie* appropriateness of the existing bargaining unit; and to fragment the bargaining relationship between the respondent and its employees presently represented by the intervener.

For these reasons, the Board finds that the bargaining unit sought by the applicant would not be an appropriate unit for collective bargaining purposes within the meaning of section 6(1) of the Act. In the result, this application is dismissed and the ballots cast in the pre-hearing representation vote taken in this matter will be destroyed by the Registrar following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty-day period.

5. This matter is referred to the Registrar.



**2383-84-OH** United Electrical, Radio & Machine Workers of Canada, Local 550,  
Complainant, v. **Camco Inc.**, Respondent

Health and Safety - Employees refusing work having full knowledge of work refusal by other shift on previous day and inspector's report that work safe - Whether taken into account in considering reasonableness of refusal - Objective test where refusal after inspector's report - Refusal as group not rendering refusal improper - Whether employer followed proper procedures - Board finding refusals not protected - Whether penalty imposed for refusal improper

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

**APPEARANCES:** Ralph Currie, Gerry Murray and Barry Wedge for the complainant; B. R. Baldwin, R. C. Wartman and W. T. Kuskowski for the respondent.

**DECISION OF S. A. TACON, VICE-CHAIRMAN AND BOARD MEMBER J. A. RONSON;** October 18, 1985

I

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* (OHSA) alleging that the grievors were disciplined by the respondent company for invoking section 23 of the Act. The discipline involved a written warning placed in the grievors' files as a result of the refusal by some thirty workers on the 30'' range line to perform their regular duties on the morning of Friday, November 16, 1984.

2. The Board heard testimony from eleven witnesses. The hearing lasted 6 days. The Board also viewed the operation of the 30'' range line at the respondent's premises. The Board has not attempted to set out the voluminous testimony in detail although the relevant factual setting is rather elaborate. In reaching its factual findings, the Board has assessed the evidence of the witnesses according to the usual factors, including the firmness of their memory, their demeanour while testifying, the consistency of their evidence, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and testimony of the witnesses are considered.

3. The Board has some further comments about the relative credibility of the witnesses. The witnesses were testifying as to a rather complex sequence of events occurring a number of months previously. After such a passage of time, absolute recall of precise detail, such as, the exact duration of meetings, the name of every person attending meetings, etc. is virtually impossible. Thus, the Board does not regard minor discrepancies on such *minutiae* as other than expected. The Board also considers that some apparent contradictions in the testimony are more semantic than real. For example, on Thursday, November 15th, a Ministry inspector attended at the plant, investigated the complaint on the 30'' range line, left the assembly area, then returned to the line for further investigation and issued a single report. Whether this is

characterized as one or two “investigations”, using the term as a matter of art, is irrelevant. Likewise, on Friday morning, whether a meeting “ended” and another meeting “started” or the various discussions are described as a single meeting does not assist the resolution of the issues before the Board. Of note, too, is the fact that, while the respondent’s witnesses used terms like “pulsating” to describe the movement of the line and the complainant’s witnesses referred to a “jerking” movement, when the witnesses *demonstrated* the motion referred to, the demonstrations were virtually indistinguishable one from another.

4. The Board regards the respondent’s witnesses as credible; their testimony was given in a candid, straightforward manner and subject to rigorous cross-examination on minute details. The Board does not imply that the testimony of the complainant’s witnesses was disregarded. In fact, much of the evidence is not in dispute, although perhaps described in somewhat different language. However, in general, the recollection of the complainant’s witnesses was less precise and their memories less reliable. And, with respect to one point, whether the line “jumped” on Friday, November 16th, the Board does not accept the testimony of the complainant’s witnesses as an accurate account of events. This aspect is dealt with further, *infra*, at paragraph 22.

5. Having regard to the above comments, then, the Board makes the following findings of fact. For convenience, the Board has referred to November 15, 1984, as “Thursday”, and November 16, 1984, as “Friday”.

## II

6. The respondent operates an appliance manufacturing and distribution plant in Hamilton. The matter before the Board concerns the 30” range line. It is not disputed that on Thursday morning there was a “jump” of about 18” on the long wooden slat portion of the line. One employee sustained a minor abrasion. The employees refused to work for safety reasons. Management agreed. The line was shut down and the maintenance crew was called. H. Ort, maintenance foreman, testified as to the repairs. W. Kuskowski, manager of the operations at the time and a professional engineer, also observed this repair work. Other members of management were present at various points during this process. The crew removed the guards on the drives and, as there were fresh scratches on the wooden slats, removed some slats at the turn around point between two sections of the conveyor. At this juncture, a bent piece of angle iron and broken support brackets were found. The bent angle iron was removed, the supporting brackets were welded back into place, the guide track was adjusted, the line was lubricated and debris removed. The maintenance work lasted several hours. In passing, the Board notes that on the weekend additional general maintenance on the line was carried out. It was also discovered that the main shaft was bent. This was replaced with an upgraded shaft during the Christmas shutdown.

7. While the maintenance crew was working, the employees were assigned alternate duties elsewhere in the plant by A. Weir (manager, shop operations). In fact, the employees on that shift performed those alternate duties for the remainder of their shift that day. It is appropriate to here note that the first shift works from 7:00 a.m. to 3:30 p.m.; the second shift’s hours are 3:30 p.m. to 12:00 p.m.

8. About 3:00 p.m., the cleared line was started and observed by management who concluded the pulsating motion was not dangerous. The ranges were loaded back onto the line in readiness for the second shift.

9. The employees on that second shift, however, refused to work within minutes of the scheduled start, expressing concerns about the jerking, erratic motion of the line. The Board earlier noted the varying descriptions of the same motion, when actually demonstrated. For convenience, the Board refers to this motion throughout as pulsating, i.e., a slow, regular, stop and start motion. The Board does not accept the testimony of J. Flanagan that the line jumped 1 - 1-1/2 feet at the start of the second shift as being inconsistent with all other accounts of the motion, including the inspector's report.

10. The refusal on the line was discussed by a number of persons, including, for the company, Weir, I. Lamb (manager, health and safety), G. Lethbridge (line foreman), R. Baldin (manager, human resources) and, for the employees, Flanagan (union steward, as well as employee on the line), E. Thurston (union representative on health and safety committee), B. Wedge (union representative on health and safety committee). Thurston had been contacted as Wedge was briefly unavailable; Wedge joined the discussion shortly thereafter. The line was started and the employees confirmed that the motion observed was the reason for the work refusal. Management expressed its view that the line, as operating, was not unsafe. The health and safety representatives responded that the employees continued to refuse to work, for safety reasons. Management agreed to contact the Ministry of Labour requesting that an inspector investigate the refusal.

11. The company sought to provide alternate work for the employees pending the arrival of the investigator. Weir directed the employees to perform their usual task on the line but while the line was stationary. Weir intended that, once the employees completed their tasks on the units directly in front of them, the employees would be instructed to stand back while the line was moved forward to the next unit. The line would be stopped again and the employees would work on the new unit. The process would be repeated, that is, the ranges would be assembled but with the employees working only while the line was stationary. Wedge objected, asserting the assignment was improper under the OHSA; the employees refused as well. At the hearing, several union witnesses testified that the alternate work assignment was refused because the workers could not be co-ordinated on such a long line and there was a fear that the employees would still be working when the line started. However, the Board finds that no such concerns were expressed to management at the time. The workers, perhaps relying on Wedge's assessment, simply refused the alternate assignment. Management stated that a refusal to perform alternate work could constitute an unlawful work stoppage but, in fact, no one was disciplined for this refusal. At this point, everyone awaited the arrival of the inspector.

12. At approximately 5:25 p.m., Inspector Middlemas arrived, was apprised of events by the company and union representatives, and proceeded to conduct his investigation. The line was started: the workers, Wedge, Thurston and Flanagan confirmed that the condition observed was the same as that which caused the work refusal. Middlemas then observed the employees performing their normal duties on the line. Middlemas stated that the line was "not likely to endanger" the workers. Management and the union representatives were informed of this conclusion; the union representatives confirmed they had no further input. Flanagan specifically informed the employees on the line of the inspector's assessment. Before



Middlemas left the plant, however, he was informed that one individual, an A. McKenzie, was continuing to refuse to work. Middlemas returned to the line, and, in the presence of the various management and union representatives, observed McKenzie as he performed his duties on the line. Middlemas confirmed that the operation of the line was "not likely to endanger". The Board notes that McKenzie had been advised by Weir that his continued refusal could constitute grounds for discipline. Apparently, there was a disciplinary letter given McKenzie but this was removed during the grievance process. This matter is not then before the Board.

13. Middlemas was also informed of the company's proposed alternate work and stated that, in his view, having the employees perform their duties while the line was stationary constituted a reasonable alternate work assignment. Middlemas indicated that any further stoppage in response to the same motion of the conveyor was an internal matter between the company and the union. In reply to a query from the union representative, Middlemas did confirm that, if the circumstances changed, that would be a new situation. The inspector left the plant about 6:30 p.m.

14. It is not disputed that the line ran for the balance of the shift and that the employees on both the first and second shifts were paid for the entire shift.

15. On Friday, however, the first shift stopped working almost immediately. Various management and union representatives congregated in the area within a short time including, Weir, L. May (line foreman), Lamb, Baldin, L. Millen (chief steward), Wedge, G. Murray (union president), M. Downie (area steward). The Board need not determine the precise order in which or time at which these persons appeared on the scene. The employees, and one J. Glass, in particular, expressed concerns about the safety of the line's movement. Tait testified he felt the line was unsafe and feared an injury. Weir recounted to the workers the events of the Thursday second shift and the inspector's assessment. Wedge stated that he also informed the employees. When Lamb arrived on the line, he, too, informed those present of the inspector's decision. The union representative spoke privately with employees on the line and informed management that the employees were refusing to work because of the pulsating motion of the conveyor.

16. Management officials met in Baldin's office about 8:00 a.m. to discuss the situation. The various union representatives were then called in and the events of the previous day reviewed in some detail, (i.e., the stoppage on the first shift, the repairs, the stoppage on the second shift, the inspector's investigation and assessment, the operation of the remainder of the second shift without incident). The union representatives confirmed they had informed the workers of these events but stated the workers were persistent in their refusal. There was no mention that the line had jumped that morning or that the motion of the line was different from that observed by Middlemas. Murray indicated he was aware that there had been maintenance work on the line on the Thursday first shift. Wedge, of course, was directly involved in the stoppage on the second shift on Thursday. Moreover, Wedge was aware of the events on Thursday morning although he insisted he was never informed of those events by the company in his "official" capacity as health and safety representative. The union representatives agreed to hold further discussions with the employees on the line in an effort to resolve the situation.

17. During this period, Weir and May had returned to the line and canvassed each of the employees asking several questions: "Are you refusing to work and why?"; "Do you know of the Inspector's decision the previous day?"; and "Are you aware this refusal could be considered an illegal work stoppage?". Only about four of the employees indicated they would be prepared to resume working. The rest stated the refusal was because of the pulsating motion of the line.

18. The employees did meet with their representatives (primarily Millen, Wedge, Murray and Downie) in the cafeteria. The union officials reviewed the events of Thursday and the discussions with management thus far that day. There is little doubt that the meeting was vocal, with the workers and union officials expressing their opinions. Murray testified that a number of employees stated the line had taken a sizeable jump that morning and that one worker even had fallen off the line, although he had not been injured. The testimony of Wedge and Millen was similar, although there was some suggestion that more than one employee had been injured on the Thursday first shift. Murray did not recall the names of any of the employees who said the line jumped nor the worker's name who allegedly fell off the line. Nor was there any other employee named as having been injured on Thursday. Murray, however, was evasive when pressed on cross-examination as to whether he relayed these details to management at the subsequent meetings. Wedge and Millen were also evasive and defensive when cross-examined on this aspect. The workers unanimously "voted", through a show of hands, not to return to work but to continue to refuse.

19. The union representatives again met with management, again confirming the employees' continued refusal to work despite the communication of information about the events of the previous day, including the inspector's conclusion. Murray stated that the workers feared that the line might jump again and that the union had done all it could to get the workers back on the line. Wedge suggested calling the Ministry of Labour. The company responded that the situation was identical to that ruled safe the previous day and that the inspector stated further refusals in respect of the same circumstances were to be handled internally. The union representatives did not indicate that the line had jumped that morning or that the situation had changed from the Thursday second shift. The company noted that it viewed the stoppages as illegal and was considering discipline. The union officials cautioned against such action because of possible further disruptions and urged that the Ministry be called. The company stated that repeated stoppages on the 30" range line could have a serious impact on other areas of the plant, i.e., that large numbers of workers in the "feeder" areas for the line would have to be sent home. Kuskowski commented that such stoppages were harming productivity and the firm's competitive position and, if the manufacture of the units was halted, units might have to be imported for distribution from other plants, such as, Louisville. Moreover, dealer tours had been organized for the following week and, if the lines were down, the company would lose business and this would translate into fewer jobs. Kuskowski also stated that, to conduct the major overhaul as the union was suggesting should be done, would require a two-month shutdown. The Board notes the evidence is conflicting as to the point in the various company-union discussions that Kuskowski made the statements. In the Board's view, it is not necessary to finally resolve this conflict as there is no dispute that the statements were made. Throughout the various discussions, the union representatives, although pressed repeatedly for specifics as to the workers' concerns with the safety of the line, only replied in generalities, that is, the employees feared another jump. Finally, however, the union stated that the line had, in fact, jumped that morning, at which point the company agreed to call the Ministry once more.

20. During these discussions, Weir had been directed to start meeting in smaller groups with the workers on the line to ascertain whether there was any confusion remaining about the Thursday decision of the inspector. The first such meeting was about to start when the inspector arrived and everyone returned to the line.

21. Inspector Middlemas arrived at 10:45 a.m. and was informed of the work refusal by the company and union officials. Middlemas canvassed some twenty-five workers on the line as to their reasons for refusing to perform their duties; all indicated they refused to work as the conveyor was “pulsating” and “jerking” and, therefore, could be hazardous, causing cuts on hands and arms or falls from the line. As all employees were giving the same responses, some using the word “pulsating” and some “jerking”, Middlemas did not continue to the very end of the line. No workers stated the line jumped that morning. It should also be noted that the workers, when asked to demonstrate the line’s motion, did so using the same motion as the witnesses. The line was started for Middlemas to observe. However, the belt conveyor (as opposed to the slat conveyor) stopped running after a few minutes. The maintenance crew repaired the problem (a slack chain drive) by removing a few links. The rubber conveyor belt itself was also “squared-up” with the rollers by hand. As the repairs were not completed until the workers’ lunch break, the investigation did not proceed further until after that break. After lunch, Middlemas observed the line, took appropriate measurements of the line’s motion and virtually every worker on the line confirmed that the motion at that point was the same as that objected to (one or two said that the line was somewhat smoother). Wedge testified he informed Middlemas that the line jumped that morning. Middlemas concluded that the motion of the line was not likely to endanger any of the workers on the line. Union and company officials were clearly notified of this assessment. Murray indicated the workers would return to their duties. Middlemas left the plant at approximately 12:30 a.m. Finally, it should be noted that the rubber covered slat power conveyor portion of the line (separately powered from the other sections) broke down about 1:30 p.m. At this point, the company sent the morning shift home in accordance with usual practice in circumstances where the repairs would continue until the shift end and there was no alternative work. All employees were paid from the start of the shift, throughout the refusal, until they were sent home early.

22. At this point, it is appropriate to deal with the alleged “jump” on the Friday morning. The company witnesses consistently testified that a second jump was not raised by any workers on the line or union officials until late in the sequence of discussions, as noted in paragraph 19 above. The testimony of the union witnesses regarding the alleged jump was seriously contradictory. For example, Millen testified that all the workers on the line were stating the conveyor jumped from the commencement of the work refusal itself and had told Weir who arrived on the scene early. Tait said that the line jumped twice on the Friday morning. Wedge said he heard that the line had jumped but was vague as to details, although he insisted he told the company officials early in the discussions. Murray implied the jump was raised during the cafeteria meeting but, as noted, was evasive as to whether he relayed this to management immediately thereafter. Tait, when describing the cafeteria meeting, did not state that the alleged jump that morning was discussed at all, let alone that there were injuries or an employee had fallen off the line. Beyond these internal contradictions, the testimony on this matter is not consistent with other testimony of those witnesses, the company witnesses or the documentary evidence. Wedge, for example, acknowledged Lamb had stated at the first meeting that “there would have to be something different” from the Thursday



second shift before the company would agree to call the Ministry again. This statement only makes sense if the alleged second jump was not raised until later. The inspector's report nowhere mentions that the workers said the line jumped Friday, just that the line was "jerking and pulsating". This latter account is consistent with Weir's testimony as to the workers' responses when he polled them and with a number of descriptions of the inspector's investigation. Further, the inspector's report only mentions the concern about possible cuts or falls, it does not record such incidents. Nor were any injuries reported to the company. Finally, Wedge testified that he personally told Middlemas of the alleged jump on Friday. Firstly, this statement would have been made in the presence of other union representatives, yet none reported that comment. Secondly, Wedge signed the inspector's report, a report which omits all mention of an alleged fact of fundamental importance and a report which concludes, "Mr. Murray, Mr. Wedge and Mr. Millen stated that they had no further input into the investigation". Whether the union witnesses honestly believed or had convinced themselves that the line jumped on Friday is not a matter which the Board need finally resolve. However, the only logical finding of fact in the circumstances is that the line did *not* jump that Friday morning.

23. Company officials, including Baldin, Wartman, Alvarez (department general manager), Kuskowski, R. Fleetham (corporate vice-president, human resources), reviewed the circumstances of the work refusals on Thursday and Friday. The company decided that some discipline was warranted for the continued work refusal by employees on the first shift on the 30" range line on the Friday after those employees were clearly informed by the company and the union of the investigation on the Thursday second shift and the inspector's conclusion. The form of discipline was a written warning placed on the record of each of the thirty workers who refused.

### III

24. Counsel for the respondent reviewed the evidence, stressing contradictions in the testimony of the union witnesses, particularly with respect to the alleged jump on Friday morning. Counsel submitted the respondent's witnesses were more credible and their testimony should be preferred. It was argued that the discipline, in the form of a written warning letter, was properly imposed for the continued refusal to work after the clear communication to the workers of the events of Thursday, including the inspector's report. That is, even assuming the workers had reason to believe the line was unsafe initially, in accordance with section 23(3) of the OHSA, after those communications, the workers did not have reasonable grounds to believe the line was unsafe, as set out in section 23(6) of the Act. With respect to several specific statements by company officials which were impugned by the complainants, counsel made the following submissions: Weir's statements on Thursday that the refusal of alternate work could be considered an illegal work stoppage was fair comment in the circumstances as the employer has the right under section 23(10) of the Act to assign such work and, in any event, no discipline was imposed for this refusal; Weir's statements on Friday that, in the face of the inspector's decision, the work stoppage could be considered unlawful, constituted appropriate clarification of the company's position. Kuskowski's statements during the discussions with union representatives on Friday that a major overhaul of the line would require a two-month shut down and continued work stoppages could result in the importation of goods for distribution from other plants, including Louisville, were not threats in the circumstances

but factual comments. Counsel referred to *Auto Jobbers Warehouse Ltd.*, [1981] OLRB Rep. Dec. 1715, reconsidered [1982] OLRB Rep. May 649, in support, particularly for the proposition that an inspector's report should be given paramountcy unless there is strong evidence otherwise. In this case, counsel submitted there was no basis for lessening the weight of that Thursday report.

25. The complainant's representative also reviewed the evidence and submitted that, as the testimony of the company's witnesses was contradictory, the evidence of the complainant's witnesses should be preferred. Firstly, it was asserted that the line had jumped on Friday morning and, thus, the employees' refusal fell within section 23(3) of the Act. In the alternative, it was the complainant's position, as stated earlier in the proceedings, that, even if the line had not jumped, the employees on the first shift were not bound by the inspector's assessment given during the second shift on Thursday and, therefore, were entitled to a separate inspector's investigation and report. The complainant's representative submitted the company had not followed proper procedures on Thursday morning, i.e., the inspector should have been called in the morning, notwithstanding the company's agreement that the line had jumped and that an investigation and repair were needed. It was asserted that the inspector's decision on Friday was subsequent to repairs that day and, thus, not applicable to the condition earlier that morning and, in any event, the inspector had not conducted a proper investigation. *Auto Jobbers*, *supra*, *AMS Diamonds*, [1981] OLRB Rep. Nov. 1534 and *Dowty Equipment of Canada Ltd.*, [1983] OLRB Rep. Sept. 1451 were referred to in support. The complainant's representative contended the various statements by Weir and Kuskowski, the company letter of November 19, 1984 and the disciplinary letter were reprisals for the work refusal, in contravention of section 24 of the OHSA. Finally, it was asserted that the respondent knew the line was in desperate need of a complete maintenance overhaul but did not want that overhaul during the scheduled dealer tours. Thus, the representative of the complainant argued that the company resisted investigation of the line with the union health and safety committee, a "coverup" in effect, and decided to portray the workers as engaging in an illegal work stoppage.

#### IV

26. It is necessary to set out here several sections of the Act:

23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report

the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or to particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4) (a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4) (a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;



- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

• • •

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

v

27. As stated in *Inco Metals Co.*, [1980] OLRB Rep. July 981 (at para 59), a decision under the legislation preceding the OHSA but confirmed in subsequent cases, the standard is an objective one:

“whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.”

There is nothing, of itself, improper in a refusal by a group of employees rather than a refusal on an individual basis: *Inco Metals*, *supra*. The worker need not ultimately be correct in his or her assessment provided that there were reasonable grounds for the refusal: *AMS Diamonds*, *supra*.

28. The Board also considers it useful to set out the following passage from *International Harvester Company of Canada, Limited*, [1983] OLRB Rep. June 898:

25. Between the initial work refusal and the decision of the inspector, the refusing employee and the employer are essentially locked in a contest of persuasion. Each must assess the situation and make difficult judgement calls. If at any time the employer correctly assesses the employee's beliefs as unreasonable, the full range of disciplinary action is available and this Board will not have any jurisdiction to interfere. Since employees only have the protection of the Act in circumstances where they can show their beliefs were reasonable, the Act provides for the employee's participation in both tiers of investigations. The Board has recognized in previous decisions (see, for example, *Canadian Gypsum Construction*, *supra*) that after the completion of the first tier of investigation, there is an increased onus on the refusing employee to show that the refusal is reasonable. The limitations on what techniques the employer can utilize to persuade a refusing employee are set by section 24.

In other words, an objective standard must be satisfied in respect of a refusal to work subsequent to an employer investigation and credible explanation that the workplace is safe and, ultimately, in the face of an inspector's investigation and report. The Board, in this case, need not deal with the standard required to fall within section 23(3), i.e., whether the worker has “reason to believe”.

29. The inspector's report itself is discussed in *Canadian Gypsum*, [1978] OLRB Rep. Oct. 897 at 902 as follows:

... an employee who continues to refuse to work in the face of an investigation and the decision by a neutral expert that these conditions do not exist, must meet the substantial onus of establishing that he has reasonable cause to believe otherwise and is entitled to the protection of the Act.

As noted in *Auto Jobbers*, *supra*, however, while an inspector's report might be expected to resolve a dispute, such a report is not conclusive but is given a weight appropriate to the circumstances of the investigation itself.

30. The application of these principles to the highly unusual facts of the instant case is not straightforward. The complainant's first argument, predicated on the alleged jump on the line on Friday morning, fails in view of the factual determination by the Board that no such jump occurred (see, para. 22, *supra*). In the alternative, the complainant submitted that the refusal on Friday was protected by the OHSA because of the workers' own assessment at the time and because the first shift Friday was not bound by the inspector's assessment on the second shift on Thursday.

31. There was some evidence that, for some time, the workers on the 30'' range line were unhappy with the condition of the line and the age of some of the components, specifically, the wooden slat conveyor. Breakdowns of one sort or another were not infrequent. As was raised in the discussions on the Friday, the workers wanted a major overhaul on the line. There was also some evidence that the employees on the second shift on Thursday were aware of the jump on the line that morning before their refusal to work. It is also likely that at least some of the employees on the first shift on Friday were aware of the events of Thursday afternoon before their shift started Friday morning. However, the Board need not determine whether the workers had "reason to believe" the line was unsafe in respect of the initial refusal on Friday morning in view of the company's response to that refusal. The Board notes, however, that its assessment of credibility, particularly of Tait (the only "refusee" who testified), would affect the Board's view of the *bona fides* of the initial refusal.

32. When confronted by a concerted refusal to work on Friday morning, the company repeatedly attempted to ascertain the precise concerns of the workers with respect to the safety of the line and to ensure that the employees were aware of the inspector's decision on Thursday. There is no doubt the workers were aware of that report, at the latest, after the employees' meeting in the cafeteria. From virtually the moment of the refusal, the employees had direct access to a number of union officials, including Wedge, a health and safety representative who had been present on Thursday, to confirm the company's explanation.

33. The union representative submitted that the first shift on Friday was not bound by the inspector's decision on the Thursday second shift. With respect, this mischaracterizes the process. It is not a question of whether the first shift is "bound" by the earlier decision in a formal, legal sense. The knowledge of that report, though, does go to the reasonableness of the refusal on Friday. The Board has found that the movement of the line on Friday was the same as that leading to the refusal on Thursday and regarded by the inspector as safe. That the second shift worked for over five hours on Thursday without incident after the inspector's decision and that the employees on Friday were also aware of this is yet another factor in assessing the reasonableness of their refusal.

34. On balance, the Board concludes that, subsequent to the company's explanation and the "cafeteria" meeting, the workers did not have reasonable grounds to believe the condition of the line constituted a danger. At that point, the workers were aware of the repairs on Thursday morning and of the refusal and the inspector's decision on the second shift that day. The workers knew that their health and safety representatives had been present at the Thursday investigation. The workers had direct access to those representatives on Friday, in addition to access to other union officials. In view of the statements by the company and the union representatives, it would not have been reasonable for the workers to conclude that the conditions were different on Friday morning from those observed by the inspector on Thursday (and, in fact, as ultimately confirmed by the inspector again on Friday). There may well be circumstances in which it would be reasonable for a worker to disregard explanations offered by the company and even his or her own health and safety representatives and union officials. However, the only worker who testified (Tait) offered no reason for doubting those explanations, he gave no cogent reasons for persisting in his refusal to work subsequent to those explanations. No other workers testified as to their reasons for continuing to refuse to work. Indeed, the complainant's representative asserted that there was no point in calling the other workers as their testimony on the grounds for refusal would not differ from Tait's evidence. Consequently, the Board finds the refusal was not one protected by the OHSA.

35. The Board notes that the union representative argued the condition viewed by the inspector on Friday was different from that existing when the employees refused to work at the start of the shift. However, the evidence of Tait that the line ran smoother after the repairs at Friday noon (i.e., the removal of a couple of links in the chain drive) is not credible when weighed against the evidence of company witnesses and the inspector's report that the employees confirmed that the motion he observed was the same as that objected to that morning.

36. The Board need only comment relatively briefly on several other positions taken by the complainant's representative. The Board does not consider the company acted improperly on Thursday morning when the line jumped. The company officials did not dispute that the cause of the jump had to be discovered and corrected. As noted earlier, the maintenance crew did locate and correct the problem. The statutory scheme culminating in an inspector's investigation and report is intended to provide a mechanism for resolving *disputes* about a worker's concerns as to safety risks, in the circumstances set out in section 23(1) of the Act. On Thursday morning, there simply was no "contest of persuasion" to use the phraseology from *International Harvester, supra*. Moreover, the company, when faced with the refusal on the second Thursday shift, did comply with the statutory scheme for resolving such disputes. In view of the events on Thursday and the numerous discussions on Friday between the company and union officials and workers, there is no substance whatsoever to the assertion that the respondent was engaged in a "cover up" and deliberately decided to characterize the workers' conduct as an unlawful work stoppage to prevent an investigation of the 30" range line.

37. As is clear from the reports, on each occasion, the inspector canvassed the workers as to their concerns and observed the operation of the line. On Friday, moreover, the inspector conducted various measurements on the line. Millen testified that the investigation on Friday only lasted two or three minutes. This is just not credible and conflicts with the evidence of all other witnesses. During the investigation, the union health and safety representatives (and



other union officials on Friday as well) were present, given an opportunity to express their views and Wedge signed the report. Thus, the submission that the inspector's investigation, or at least the Friday investigation, were improper or insufficient in any way is unsupported by the evidence.

38. The complainant's representative objected to Weir's statement to workers on the Thursday second shift that the refusal to perform alternate work (i.e., on the stationary line) could be considered an unlawful work stoppage. The Board notes the inspector's opinion that the work provided was safe. However, as there was no discipline imposed for refusing that work assignment, the Board need not deal further with this matter.

39. There is no doubt that the discussions between company and union officials on Friday became somewhat heated. Given that the union wanted a complete overhaul of the line, Kuskowski's statement that that process would necessitate a two-month shutdown does not amount to intimidation or coercion contrary to section 24(1) of the Act. Weir's statement to employees on Friday that the company could regard the continued refusal as an unlawful work stoppage is also not a violation of the Act; Weir was stating the company's position in response to the workers' refusal. The Board has more difficulty with Kuskowski's statements regarding the importation of products from other plants. There is a fine line between a statement of fact and a threat regarding alternatives open to the company in response to a work refusal. However, in this case, the Board has found that there were no reasonable grounds for that work refusal, as the company correctly assessed. Not unexpectedly, the frustration of company officials increased as the refusal persisted despite repeated attempts to resolve the matter. In the circumstances, the Board does not regard these statements as contraventions of the OHSA.

40. Having found that there were no reasonable grounds for the refusal on Friday as stated in paragraph 34 above, in accordance with section 24(7) of the Act, the Board must consider the choice of penalty imposed by the company. As noted, the discipline consisted of a written warning placed in the file of each "refusee". Indeed, the warning of further discipline is itself restricted:

You should clearly understand that should the same situation reoccur, the company will consider you to have acted unreasonably and we will advise you that if you are not prepared to perform work which is available and not unsafe, you will be directed to leave the premises and will be subsequently advised of disciplinary action up to and including discharge.

The company has selected a mild form of discipline and, in the Board's view, there is no justifiable basis on which to interfere with that choice of penalty. Finally, the Board does not regard the letter of November 19, 1984, addressed to all employees as discipline or intimidation; the letter is merely a recitation of events and the company's position, including a request for co-operation in making a positive impression during the dealers' tours.

41. For the foregoing reasons, then, the Board dismisses the complaints.

## **DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG;**

1. This complaint under the Occupational Health and Safety Act, section 24, alleges that the grievors were disciplined by the respondent company for invoking section 23 of the Act.



2. The testimony indicated a legitimate safety complaint was made by the workers at Camco Inc. on the first shift 7:00 a.m. to 3:30 p.m. on Thursday November 15, 1984. There was a jump on the 30" range line and the employees refused to work for safety reasons. The line was shut down and the company maintenance crew was assigned to make repairs to the line. The Ministry of Labour was not called to investigate the condition or cause for the jump in the line.

3. From the evidence a pulsating condition or erratic jerking motion had been present in the line for some time. The workers were unhappy with the condition and frequent breakdown and wanted an overhaul of the line. The pulsating or erratic motion was still present after the repair was completed by the maintenance crew. At about 3:00 p.m. the line was ready for the second shift, 3:30 p.m. to 12:00 p.m.

4. They refused to work shortly after the start of the shift, as they were concerned with the erratic jerking motion of the line. The Ministry of Labour was called by the company requesting an inspector to investigate the work refusal. Inspector Middlemas arrived and conducted his investigation and stated the line was "not likely to endanger the workers." The erratic pulsating condition of the line was the concern of the second shift and Mr. Middlemas. The inspector was not asked to deal with the original condition causing the work refusal of the first shift, the jump in the line.

5. I can understand the concern of the workers on a line moving a few inches at a time suddenly moving one foot to eighteen inches. That jump was the cause of the original work refusal and there was no assurance the reason for the jump was rectified despite the repairs to the line.

6. Repairs were performed by the maintenance crew to the line over the weekend and the line was overhauled during the Christmas shutdown. This would indicate the respondent company knew the line still needed repairs to rectify the original condition notwithstanding the five hours of production by the second shift on November 15.

7. On Friday November 16, the employees and Mr. J. Glass, in particular refused to work and expressed concerns about the safety of the line and a fear of injury. In my view, it is not necessary to determine if the line did jump on Friday morning. The fear of a jump and injury was expressed and workers need not wait until someone loses life or limb to determine an unsafe condition exists. Section 23.3 of the Act is clear and gives the workers the right to refuse to work if there is reason to believe an unsafe condition exists.

23.3 (a) Any equipment, machine device or thing he is to use or operate is likely to endanger himself or another worker.

8. The union representatives did all they could to get workers back to work. But there was a fear the line might jump again and they suggested the Ministry of Labour be called. The company stated that repeated stoppage on this line could have a serious impact on other areas of the plant. The workers in the "feeder" area for this line would have to be sent home. Mr. Kuskowski, who was manager of operations commented that the work stoppages was harming productivity and the companies competitive position, and if production of the range unit was halted, units might have to be imported from Louisville. A dealers tour had been

organized for the following week and if the lines were down, the company would lose business which would mean fewer jobs.

9. It is clear the company was concerned about production and the planned dealers tour, and was not prepared to close the line down for a complete overhaul to correct the cause of the jump. They decided disciplinary action was necessary for the continued work refusal by the workers of the first shift and placed written warning on the record of each of the thirty workers on that shift who refused.

10. The workers on the first shift had reasonable grounds to believe the line was unsafe on Friday November 16, and that was the reason for their refusal to work. Therefore, in my opinion, the disciplinary action taken by the company should be withdrawn from the employees files. I also view Mr. Kuskowski's statement regarding importation of products from Louisville as threatening and intimidating, giving the workers a choice between jobs for themselves and fellow workers or producing in a perceived unsafe environment.

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**2869-84-R** Mr. Harry Panesar and Mr. Antonio Valente, Applicants, v. Hotel Employees Restaurant Employees Union Local 75, Respondent, v. **Canadian Pacific Hotels** (Chateau Flight Kitchen), Intervener, v. Group of Employees, Objectors

**Petition - Termination - Termination petition followed by timely counter-petition - Whether counter-petition perceived to be employer supported - Whether union exerted undue influence in obtaining signatures**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *F. Burnet* and *L. C. Collins*.

**APPEARANCES:** *James Fyshe* and *Tony Valente* for the applicants; *Ross Wells*, *Robin Nunn* and *George Pineo* for the respondent; *Katharine Braid*, *Tony Alvarez* and *Grace O'Leary* for the intervener; no one appearing for the group of employees.

**DECISION OF THE BOARD;** October 24, 1985

1. The applicants have applied under section 57(2) of the *Labour Relations Act* to have the Board declare that the Hotel Employees, Restaurant Employees Union, Local 75 ("Local 75") no longer represents the employees of the Canadian Pacific Hotels (Chateau Flight Kitchen) ("the employer") for whom it is the exclusive bargaining agent. Sections 57(2) and (3) of the Act provide:

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
  - (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of the new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.
- (3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have *voluntarily signified in writing* at such time as is determined under clause 103(2)(j) *that they no longer wish* to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

[emphasis added]

2. It is clear from a reading of section 57(3), particularly the emphasized phrases, that the Board must decide what are the wishes of the employees on an application for termination of bargaining rights. Those wishes must be in writing and section 73(1) of the Rules of Procedure under the Act prohibits the Board from receiving evidence of the employees' wishes except in writing. From the word *voluntary*, it follows that the Board must be satisfied that the written evidence expresses the employees' own wishes and not those of someone else; for example, not their employer's wishes or what they reasonably believe to be their employer's wishes. Written evidence on an application for termination is usually submitted in the form of a signed petition which includes a statement that the persons who signed the petition no longer wish to be represented by the trade union that has been their bargaining agent. The date set pursuant to clause 103(2)(j) of the Act for examining the wishes of the employees is the terminal date of the application. If the Board ascertains from the evidence that not less than forty-five per cent of the employees wish to terminate the bargaining rights of the union, the Board will direct the taking of a representation vote. If a majority of the ballots cast by eligible voters are cast against the union, the Board will be satisfied that a majority of the employees desire that the union's bargaining rights be terminated and it will declare that the union no longer represents employees in the bargaining unit.

3. Section 73(3) of the Rules of Practice permits employees opposed to an application to terminate bargaining rights to file a statement in writing expressing their opposition. The Board usually refers to these statements as revocations or counter-petitions. Since the document which they seek to oppose must be a voluntary signification of the employees' wishes, it follows that a revocation or counter-petition must also be voluntary if it is to have the effect desired by the employees who filed it. If a counter-petition is filed on or before the terminal date of the application, conforms to section 73(1) of the Rules and includes signatures of employees who also signed the petition, it raises a question of what were the wishes of those employees as of the terminal date. The Board relies on the most recent, voluntary expression of the wishes of the employees as the most reliable expression of their wishes. That has been



the policy of the Board for many years and that policy was recently reaffirmed in the Board's decision in *Browning-Ferris Industries*, [1982] OLRB Rep. June 816. The decision deals with an application for termination of bargaining rights and it analyses the Board's rationale for relying on the most recent voluntary expression of employees' wishes as being the most reliable. The Board applies the same policy in applications for certification. See *Baltimore Aircoil Interamerican Corp.* [1982] OLRB Rep. Oct. 1387.

4. The applicants sought to satisfy the requirement of section 57(3) by filing with the Board petitions bearing signatures of persons purporting to be employees of the employer in the bargaining unit. The signatures on the petitions which matched names of employees on the lists filed by the employer totalled significantly more than 45 per cent of the employees in the bargaining unit. There also was filed with the Board a petition containing signatures of persons purporting to be employees in the bargaining unit who wished to have Local 75 continue to represent them. The Board will refer to it as the counter-petition and it reads as follows:

We, the undersigned employees of the Chateau Flight Kitchens, Malton, Ontario, wish to continue to be represented by Local 75 - Hotel Employees Restaurant Employees Union, and to have our names removed from any other petitions that may be presented to the Ontario Labour Relations Board with regard to an application for decertification against Hotel Employees Restaurant Employees Union Local 75.

The applicants' petition and the counter-petition were filed by February 1, 1985, the terminal date set for the application. Some of the signatures on the counter-petition were those of employees who also had signed the applicants' petition. That "overlap" is sufficient to reduce the apparent support for the applicants' petition below the requisite 45 per cent of the employees in the bargaining unit if the counter-petition represents the voluntary wishes of the employees who signed it.

5. When petitions are filed with the Board in applications involving representation rights, the Board conducts its own inquiry into their origin and the circumstances under which they were signed by employees and filed with the Board. In view of the overlap of signatures between the applicants' petition and the counter-petition in this case, the Board, in keeping with the policy referred to in paragraph 3, began its inquiry with the counter-petition. After the Board had heard all of the evidence with respect to the counter-petition, counsel for the applicants and Local 75 advised the Board that they were prepared to defer inquiry into the petition until the Board determined whether the counter-petition expressed the voluntary wishes of sufficient employees to reduce the applicants' support to *less than* 45 per cent of the employees in the bargaining unit. Counsel for the applicants and Local 75 were further agreed that the application would fail and be dismissed if the Board found that the counter-petition was "voluntary" and contained enough signatures to reduce the applicants' support below the requisite 45 per cent. Conversely, if the Board found that the counter-petition did not express the voluntary wishes of enough employees to have that effect, the Board would inquire into the origin, signing and filing of the applicants' petition. Respondent counsel made no submissions on the subject. Accordingly, the Board will follow its customary procedure as reaffirmed in *Browning-Ferris*, *supra*.

6. The Board heard the testimony of Todd Knapton, Maureen Graham, Lina Simao, Louis Paulovski, Salome Johnson and Michael Harracksingh, witnesses produced by Local 75 for purposes of the Board's inquiry into the counter-petition. The parties also had full

opportunity to examine them. In addition, the Board heard the testimony of Harry Panesar, Antonio Valente, Joe Bava, Ammanio Ricardo, Tony Ricciardi and Maria Ferreira, called by the applicants to support their general challenge to the voluntariness of the counter-petition as well as their specific allegations that the signatures on it were obtained with the assistance of the employer and by the use of threats by the employer and Local 75 respecting the terms and conditions of employment and job security of the employees. John De'Almeida and Felgueires Alves, respectively the employer's customer service manager and general manager, testified for the employer in response to the allegations respecting the employer. Local 75's counsel called Gerry Jones, Local 75's business representative responsible for the bargaining unit, and recalled Lina Simao and Maureen Graham in reply. The witnesses' evidence was heard during four days of hearings carried on over four months. The Board has reviewed and weighed their evidence having regard to the firmness of their memory, the consistency of their evidence, the clarity of their recall, their ability to relate clearly the events about which they were testifying and to avoid the influence of self-interest to modify their recollections, their demeanor as witnesses, including their responses under cross-examination and what appears to the Board to be reasonably probable, having regard to the circumstances and testimony. The Board has also given account to the submissions of the parties with respect to conflicting testimony. In those respects, where the testimony of Ammanio Ricardo conflicts with that of other witnesses, the Board has preferred the testimony of the other witnesses. The findings of fact herein have been made having regard to all of the foregoing.

7. Local 75 is not a stranger to attempts to terminate bargaining rights for employees in the bargaining unit affected by this application. Several of the witnesses testified that they had played a passive or active role during a similar application in 1982. See *Canadian Pacific Hotels Limited*, [1982] OLRB Rep. June 824. Their evidence confirms the obvious conclusion that Local 75 survived that challenge to its exclusive bargaining rights. Jones' evidence was that this application represents the third attempt to dislodge Local 75. The facts recited in the Board's 1982 decision, *supra*, are that a former steward of Local 75 became dissatisfied with Local 75's service and after contacting and receiving advice from the business agent of another union in the air transportation industry, joined with another employee to seek to have Local 75 "decertified". It is common ground between the applicants and Local 75 that the applicants and the employees who support them are seeking to terminate Local 75's bargaining rights in the hope that the other union would make a successful application for certification once the Board terminated Local 75's bargaining rights.

8. The Board has no *viva voce* evidence as to when the applicants' signature campaign began, but their application was made after Local 75 had commenced to bargain with the employer for renewal of the collective agreement between them. There had been three bargaining meetings between them when the application was filed with the Board. A fourth one was held on the same day, January 24th, 1985 that the Board mailed its notices to the parties with respect to the application. That was the day on which a majority of the counter-petition signatures were obtained. A few employees had signed the day prior and the remainder of the signatures were collected on January 27th, 28th, 29th and 31st. The January 24th bargaining meeting was held on the employer's premises, the practice in prior negotiations. Besides Jones, Local 75's committee consisted of Graham, Simao, Paulovski and Harracksingh, all of whom are department stewards, and Ricardo who is not a steward but had volunteered to be on the committee to represent transport employees. The committee members were off work that day to attend the bargaining meeting. When it was adjourned for lunch from approximately 12:30 p.m to 2:00 p.m., the four stewards left to canvass employees for

signatures on the counter-petition. Ricardo told the Board that he signed the counter-petition in the presence of the stewards before they left to collect signatures, but he did not try and get counter-petition signatures from other employees.

9. Some of the employees approached by the stewards during the lunch adjournment were in non-working areas like the cafeteria or washrooms and others were canvassed at or near their work places during their working hours. Usually there is only one supervisor on duty from 12:30 p.m. to 1:30 p.m. in the kitchen. He is usually in the kitchen office where he works on meal schedules for the aircraft. The others take their lunch from 12:30 p.m. to 1:30 p.m. The stewards told the Board that they knew from their experience in 1982 they needed to be cautious not to ask employees to sign a petition in circumstances where a supervisor would be aware of the activity, or where the employee would have cause to suspect a supervisor could see whether he signed the petition. When Paulovski went to the kitchen where he works as a cook, to get signatures from fellow employees, his supervisor was at work in the kitchen. Paulovski was candid in telling the Board that his presence was observed by the supervisor, that the supervisor was able to see that he was talking with employees and holding some papers in his hands. He is steward for the kitchen and when employees saw him with papers some asked him what they were. He told them that they were Local 75's petition and asked them if they would sign it. He got other signatures by approaching employees directly in the kitchen and in the dish room. The dish room is not Paulovski's work area. His supervisor knew Paulovski was excused from work that day in order to attend the negotiating meeting and so did the employees.

10. The Board is satisfied on the evidence that the other stewards exercised care to avoid being seen by supervisors when they were getting signatures. Nonetheless, one supervisor was told by an employee on January 24th that a petition was being circulated in the work place. The supervisor reported the information to Felgueires Alves, General Manager of the Flight Kitchen. When the bargaining meeting reconvened at approximately 2:00 p.m., Alves told Jones what he had heard. He told Jones he did not know or care whose petition it was, no petitions were to be circulated in the work place. Alves also sent instructions to all departments that employees were not allowed to circulate petitions and if they did, they were to be reprimanded. Union stewards require authorization from the employer to conduct union business at work. They are not permitted to go from their own department to another one in order to talk to employees. If a steward needs to talk to an employee, he is required to do it in the cafeteria. According to Alves, employees would expect to be reprimanded by their supervisors if they were found talking at their work place with someone from another department.

11. When Local 75 wants to hold meetings of the employer's employees, they are held in the employer's cafeteria. This has been the practice during Jones' tenure as business representative. Employees were accustomed to the practice. They must be arranged for times which do not interfere with operations and the employer's authorization has to be obtained in advance. Jones held meetings of employees on January 23rd. Three meetings were held so as to cover employees on all three shifts. Jones had called the meetings to discuss the negotiations, particularly some proposed changes to the seniority system. Jones did not limit the meeting to what was happening in negotiations however. He told each group at the start of its meeting he would be talking about the petition to terminate Local 75's bargaining rights and about the negotiations. He did as he said. There were some testy exchanges between Jones and a few individual employees. One was when the applicant Panesar tried to debate with



Jones about a particular benefit expectation employees had in regard to the other union. Jones made it clear to Panesar that it was Jones' meeting and not a forum for the applicants. Jones also told the employees that Local 75's counter-petition was available for signing by employees.

12. With respect to the applicants' petition, Jones told the employees that they should be aware of how the "decertification" process works and of some of the risks they might face in the intervals between Local 75's bargaining rights being terminated, its collective agreement expiring and a new union getting certified and negotiating a new collective agreement. He explained that the Board would hold a vote if the application was successful. If the applicants won the vote, Local 75's bargaining rights would be terminated and the employees would no longer be covered by its collective agreement. There would be no new collective agreement until another union got certified and negotiated one. He also warned the employees of the possibility for delay, particularly if the applicants' petition was challenged. He told them it could take "a week, a month or up to three months" for the application to be decided. He identified what potential risks he thought the employees might face in the interval between the termination of Local 75's bargaining rights and a new collective agreement coming into effect. In his view, that interval would offer the employer an opportunity to:

- (1) reduce wages;
- (2) tamper with seniority;
- (3) pay newly hired employees at or near the minimum wage; and
- (4) cancel or reduce benefits.

13. Jones told the employees that the employer's bargaining proposals contained a proposal that wages be reduced by five per cent. In cross-examination, he testified that he believed it possible in the current climate, presumably a reference to the economic and collective bargaining climate, that the employer might cut wages and benefits if the employees were without the protection of a collective agreement. In order to support his view that it would be possible for the employer to tamper with seniority, Jones recited to the employees a recent example at one of the Toronto Airport terminals where one union displaced another and the employees ended up having to establish anew their seniority with the employer. He told the employees that they could verify the example for themselves by talking to the cooks at the terminal. In the same fashion, he told them they did not have to take his word for how the "decertification" process operated, they could check with the [Ontario Labour Relations] Board. Jones made no mention of section 79 of the Act, commonly called the "freeze" section, which operates to preserve the status quo respecting wages and terms and conditions of employment when an application for certification is made.

14. Jones first heard in December, 1984 that some employees were trying to get support for another union to displace Local 75. He also learned that Joe Bava, an employee in the dish room, was supporting the other union. Bava has seven years service and was around in 1982 when Local 75 survived an attempt to have its bargaining rights terminated. Jones told Bava what he had heard about Bava supporting the other union. His account of the meeting and Bava's differ. Bava testified before Jones. He stated to the Board that Jones had told him that he had made a mistake in signing for the other union, when it was all over Bava would be gone and he, Jones, would still be there. Bava understood Jones to be telling him that he would eventually lose his job if Local 75 remained as bargaining agent. Bava acknowledged in cross-examination that he had remained employed after Local 75 fended off a similar attempt

in 1982 and, had he not wanted to work under Local 75's agreement with the employer, it would have been necessary for him to find work elsewhere. Jones' account of the meeting is that he told Bava that "enough is enough", if he wanted a union other than Local 75, go where there was a union he liked because Jones and Local 75 "are here to stay". According to Jones, Bava became a little angry with him and Jones did not understand everything Bava said. Jones was referring to the fact that they were speaking to each other in English and Bava's natural language is Italian. Jones did understand Bava to say that he intended to keep working for the employer (at the Flight Kitchen). Jones responded that he and Local 75 were staying also and Bava would have to work under Local 75's representation.

15. That was where the matter ended by Bava's account and he denies that there was a second conversation on another day. Jones, on the other hand, said that Bava asked to speak with him a week or 10 days later. On this second occasion Bava is said to have asked Jones why Jones had told him that he, Jones, would fire Bava. Jones said he denied to Bava that he had said such a thing and stated that he had no power to fire Bava. Jones claims he tried to explain to Bava what he had said and they eventually parted on a handshake. Before the end of the encounter, however, Jones claims that he told Bava he wanted him as a steward for Local 75, to which Bava replied that his English was not good enough. Bava had been challenged in his cross-examination that Jones would testify about a second conversation between them during which Jones asked Bava to be a steward. Bava responded to the challenge by saying that it was not possible Jones had asked him to be a steward because his English was not good enough for that job.

16. Bearing in mind that the Board must determine the wishes of the employees in this application as of its terminal date and the counter-petition is the most recent expression of those wishes, the issue becomes one of whether the Board is satisfied on the evidence that the counter-petition is voluntary. That is the sole issue for any petition or counter-petition, whether the application that it relates to is an application to establish or to extinguish bargaining rights. See *Westinghouse Canada Inc.* [1982] OLRB Rep. July 1098 at paragraph 7. The burden of satisfying the Board rests with the party or parties relying on the document in question. In this case, the document is the counter-petition and the burden rests with Local 75. Counsel for the applicants contends that Local 75 has failed to satisfy the burden on two grounds, either of which establish the counter-petition as not voluntary. First, the employees signed the counter-petition because they perceived their employer to be supporting it, whether or not the employer actively assisted Local 75 with the counter-petition campaign. Second, Local 75 used its position as the incumbent bargaining agent to exert undue influence in getting employees to sign the counter-petition.

17. With respect to the first ground, it is correct that the Board has held petitions not to express the voluntary wishes of employees who signed them if the Board has evidence that it would have been reasonable for the employees to perceive their employer to have been involved with the origin, preparation or circulation of the petitions. This is because there is a natural presumption that employers prefer not to have to bargain with unions and employees see employers in that light. Thus, employees who reasonably suspect the hand of their employer behind a petition might sign the petition for either of two reasons. First, because they perceive it to be their employer's wish that they sign the petition or, second, that they sign the petition out of concern they might suffer reprisals from the employer if the employer learns of their failure or refusal to sign the petition. See *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813. Employees who sign a petition for either of those two reasons

would not be expressing their own wishes, rather they would be expressing what they perceive to be their employer's wishes. It is the employees' wishes which the Board must determine in order to discharge its responsibility under section 57(3) of the Act. That is why the Board should not give any weight to the counter-petition in the instant case, according to counsel for the applicants: it does not express the wishes of the employees who signed it; rather it expresses what they perceive to be the employer's wishes.

18. The difficulty with that argument is that it ignores the different purposes served by petitions and counter-petitions. Petitions seek either to prevent a union from acquiring bargaining rights or to extinguish bargaining rights which it already holds. Counter-petitions, on the other hand, seek to defend a union's attempt to acquire bargaining rights or to defend the bargaining rights which it already holds. Therefore, successful counter-petitions operate against the presumed preference of employers not to have to bargain with unions. That being the case, in order for the Board to make a finding that it would be reasonable for employees to perceive their employer as supporting a counter-petition, there would have to be evidence that the employer had made known to the employees by its actions that it preferred to deal with the union which would benefit from the counter-petition. In the context of the instant case, the Board would have to have evidence that the employer made known to the employees that it preferred to deal with Local 75 rather than with another union or no union at all. There is no evidence before the Board of actions by the employer which would convey that message to the employees. Absent such evidence, it would not be reasonable for the employees to perceive the employer as supporting Local 75's counter-petition.

19. The Board turns, now, to the second ground advanced by counsel for the applicants, that is, the Board should find the counter-petition not to be voluntary because Local 75 has used its position as the incumbent bargaining agent to exert undue influence in getting employees to sign its counter-petition. Undue influence is part of the Board's normal focus when assessing counter-petitions. This is evident from the Board's decision in *Frito-Lay Canada Ltd.*, [1981] OLRB Rep. May 538 when it described the purpose of its inquiries into counter-petitions as being "... to determine whether there is evidence of threats, intimidation, undue influence, misrepresentation, or other conduct which might impair the ability of an employee to voluntarily express his wishes.". That focus recognizes the different considerations which apply when the Board is assessing what weight is to be given to counter-petitions compared with petitions. In the context of an application for certification, the Board discussed these different considerations at paragraph 10 of its decision in *Frito-Lay*, *supra*, in the following terms:

While petitioners and revocations have equal status in the sense set out above, the Board recognizes that in assessing the weight to be given to a revocation or "counterpetition" there are different considerations than in the case of a petition opposing the union. In the case of a petition, employee signatories are more likely to be sensitive to the perception of management involvement, or the fear that, a failure to sign may be communicated to their employer and could result in reprisals. In the case of membership evidence or revocations, however, support will seldom be solicited by individuals who can affect an employee's economic destiny, nor will there usually be any fear that a failure to sign a membership card or revocation will be communicated to the employer and could result in adverse employment consequences. (However, see *Veres Wire* [1976] OLRB Rep. July 337 where the Board rejected certain union membership evidence because of the involvement of a foreman in the union's organizing campaign). Accordingly, the purpose of the inquiry into the origination of a revocation statement is to determine whether there is any evidence of threats, intimidation, undue influence, misrepresentation, or other conduct which might impair the ability of an employee to voluntarily



express his wishes. The concerns expressed in *Radio Shack* and *Pigott Motors* have no strict application to revocations or union membership evidence.

20. Counsel for the applicants points to the different effect of petitions compared with counter-petitions for another reason. Noting that a successful petition results in a representation vote being held and a successful counter-petition prevents a vote, counsel argues that the Board should be cautious in its assessment of Jones' conduct. In particular, he submits that the Board should not be too quick to label Jones' conduct as the reasonable exercise of freedom of expression in defending Local 75's bargaining rights from being taken over by a rival union.

21. Counsel for the applicants argued that Jones' remarks at and conduct of the January 23rd meetings, when viewed in the context of his role in negotiations with the employer, were coercive in nature. Counsel cites several circumstances which he claims support that proposition. The January 23rd meetings were on the employer's premises and Jones needed the employer's permission to hold them. He made it clear to the employees that they were his meetings. Jones used the meetings to reveal to the employees the employer's bargaining proposal that wages be reduced, then he proceeded to identify wage reductions as one of four potential risks employees might face if there was a delay between the termination of Local 75's bargaining rights and another union coming in. By doing so, he forged a clear link between his role in negotiations with the employer and the counter-petition. Both circumstances, counsel submits present reasonable grounds for the employees to perceive Jones as having an inside track to the employer's intentions and the opportunity to participate in the employer's decisions about the employee's future. Therefore, it would be reasonable for employees to view Jones' remarks about the four potential risks as threats to the security of their individual terms and conditions of employment and to their job security if they refused to sign the counter-petition.

22. Counsel argues also that the link between the negotiations and the counter-petition was reinforced the next day, January 24th, when the stewards emerged from negotiations and began soliciting signatures on the counter-petition throughout the employer's premises. Since the employees would be aware that the stewards were coming straight from the negotiations, counsel contends that it would be reasonable for employees to believe that the stewards were in a position to influence the employer's decisions about their future. That would particularly apply, according to counsel, if the stewards made remarks to employees which might be viewed by them as threats to their job security. A counter-petition signed in those circumstances, counsel submits, would not be voluntary and would not represent the wishes of the employees who signed it.

23. Counsel argues further that Jones misrepresented to the employees the potential risks involved in changing their bargaining agent because he failed to inform them of the protection against such risks which section 79 of the Act provides. That alone is sufficient cause for the Board to disregard the counter-petition as not representing the wishes of employees who signed it, counsel submits.

24. There is nothing in the evidence respecting the conduct of the stewards which supports the applicants' argument that it would be reasonable for employees to see the stewards as being able to influence their employer's decisions about their futures. The evidence does not support a finding of fact that any employees were threatened by the stewards. Nor does the evidence support a conclusion that Jones' conduct of the January 23rd meetings demonstrated an exercise of threats, intimidation or undue influence. The fact that they were

held in the employer's cafeteria was not threatening to the employees. It is an established practice to hold employee meetings there and the employees are aware of the practice. No doubt the tone and mood of the meetings was not that of a formal debating society. The meetings were about some critical bargaining issues and a concurrent campaign to terminate Local 75's bargaining rights. Within that context, the Board finds nothing in the form of the meetings that would impair the voluntary expression of employees' wishes when they were asked later if they would sign the counter-petition.

25. Turning to the substance of the meeting and Jones' exposition of what he believed were the potential risks facing employees, all as set out in paragraphs 12 and 13, the facts are that his remarks were made with respect to what the employer could do in any interval during which the employees would not be represented by any bargaining agent. It would not be reasonable on the facts of this case to infer that Jones was saying to the employees that the employer would reduce wages, tamper with seniority, pay new employees at or near the minimum wage and cancel or reduce benefits. Nor would it be reasonable on those facts for employees to perceive that Jones could cause those things to happen. While Jones did not point out to the employees the limitations placed on the employers' opportunity to change unilaterally any terms and conditions of employment, he did explain the steps involved in replacing one bargaining agent with another and the inherent risk of delay in completing that process. The Board is satisfied from the evidence about his explanation that he was referring to what could happen while there was no prohibition on the employer's unilateral action.

26. What he said was not wrong. If the employer was so inclined, it could do any or all of the things to which Jones referred as long as the section 79 freeze was not in effect. In the context of this application for termination of bargaining rights, on the issuing of a declaration from the Board that Local 75 no longer represented the employees, the employer would be free to alter terms and conditions of employment without the consent of Local 75 or any other trade union. That situation would last until the employer received notice from the Board that a trade union had applied for certification. At that point, section 79(2) of the Act would apply and the employer could not alter, amongst other things, the terms and conditions of employment without a consent of the trade union which made the application. If the application for certification had followed immediately on the heels of the Board's declaration terminating Local 75's bargaining rights, the employer would only have those few days which it takes for the Board to serve the employer with notice of the application in which to act unilaterally. Nonetheless, as brief as that period might be, the employer would be free to alter terms and conditions of employment if it chose to do so.

27. When Jones' remarks and his conduct of the January 23rd meetings are viewed in that context, the Board is satisfied that he has not engaged in conduct which has improperly influenced employees to sign the counter-petition. No doubt Local 75 as incumbent bargaining agent had an advantage and Jones seized it when he used the meetings on January 23rd to address the employees about the applicants' campaign to have Local 75's bargaining rights terminated. But, to adopt the Board's words in *Frito-Lay, supra*, the ability of the employees to voluntarily express their wishes has not been impaired by threats, intimidation, undue influence, or misrepresentation as a result of Jones' remarks at and conduct of the January 23rd meetings. In particular, the Board disagrees with the proposition that Jones' remarks and conduct at those meetings gave the employees reason to believe that he could influence the employer's decisions about the future of individual employees. It would not be reasonable on the facts before the Board for employees to perceive Jones as being able to exert that influence.

There may be circumstances where the Board has evidence before it that a trade union and an employer are in league with each other, in which circumstances the Board might find it reasonable for employees to perceive the trade union representative as being able to adversely affect their job security. Were that to be found, however, a trade union would likely be faced with more serious problems about its capacity to be the exclusive bargaining agent of the employees than the problem presented by the issue of whether its counter-petition was voluntary. The Board emphasizes in the instant case that there is not a scintilla of evidence before it to suggest that Local 75 and the employer have anything other than a *bona fide* collective bargaining relationship.

28. With respect to the encounter or encounters between Bava and Jones, whether the Board accepts Bava's testimony that there was only one, or Jones' testimony that there were two, the Board is satisfied that Jones did not threaten to have Bava's employment terminated. The Board had the opportunity to observe both witnesses as they testified. Bava gave his evidence with the assistance of an interpreter, so he heard and answered questions in his own language. Even so, he had difficulty responding clearly to questions. Jones was candid and forthcoming in his evidence about the two encounters which he said took place. He was not cross-examined on his testimony respecting Bava and nothing in the way he gave his testimony gives the Board reason to doubt his version of what he said to Bava. The one exchange which they agree took place was in English and what Jones said obviously angered Bava. Having regard to that circumstance and having had the opportunity to observe Bava as a witness, the Board is of the view that he was honestly mistaken in what he believed Jones to have said.

29. For all of the foregoing reasons, the Board finds that the counter-petition represents the wishes of the employees who signed it and, being the most recent statement of their wishes, it is the best evidence before the Board of the employees' wishes as of the terminal date of this application. In the result, the Board is satisfied that *less than* forty-five per cent of the employees in the bargaining unit for which Local 75 is the bargaining agent at the time this application was made, have voluntarily signified in writing that they no longer wish to be represented by Local 75 as of February 1, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for purposes of making such determination.

30. The application is, therefore, dismissed.

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**0343-85-R United Steelworkers of America, Applicant, v. Canadian Timken, Limited, Respondent**

**Bargaining Unit - Whether persons performing clerical functions within unit of stock attendants - Board reviewing and applying criteria for community of interest - Finding clerical functions integral to warehouse operation - Fact that persons properly included in office unit also not preventing finding that unit sought appropriate**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

**APPEARANCES:** *Keith Oleksiuk*, *Paula Turtle*, *Marion Tobin* and *John A. Desmier* for the applicant; *Bruce Binning*, *M. M. Haycock* and *W. Riecker* for the respondent.

**DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN, AND BOARD MEMBER H. KOBRYN; October 18, 1985**

1. The name of the respondent is amended to read: "Canadian Timken, Limited".
2. The Board, by decision dated June 11, 1985, granted the applicant interim certification. The parties disagreed over whether four employees; two classified as order analysts, one classified as an order data entry clerk and the other classified as a clerk typist came within the bargaining unit. The parties did agree that the resolution of that issue depended upon whether the employees in dispute share a community of interest with the other employees that the parties agreed were in the bargaining unit.
3. The parties filed written statements of fact in relation to this issue. At the hearing convened by the Board, the parties were content to rely on the statements of fact filed and made their submissions to the Board based on those statements.
4. The respondent's business is the manufacture and sale of roller bearings. The application for certification relates to the respondent's premises in Mississauga, Ontario, which includes a building containing a warehouse and office space. The employees that the parties agree are in the bargaining unit are the stock attendants and chief stock attendant. The stock attendants and chief stock attendant work in the warehouse portion of the respondent's premises. They receive, sort, store, pack and ship the company's products and perform minor maintenance duties. The chief stock attendant assigns work to the stock attendants as well as performing stock attendant duties. The packing and shipping of orders are done pursuant to the warehouse "pick tickets" that are produced by the computer terminal operated by the order data entry clerk.
5. The order analyst position did not exist prior to December, 1984. That position was created as a result of the computerization of the respondent's warehouse operations. The order analysts receive and process telephone orders for the respondent's products. There is occasional daily contact between the order analysts and the stock attendants. Their work functions are characterized by the respondent as "inside sales", whereas the applicant views their function as receiving orders and processing them by entering the information into the computer. Prior to the creation of the order analyst position, the stock attendants were responsible for taking telephone orders.

6. The order data entry clerk, or operator of the data entry equipment, enters all orders into the respondent's computer, produces the pick tickets for the orders that the stock attendants fill and prints invoices and credit notes through the computer.

7. The clerk typist perform various clerical duties as well as taking orders over the telephone. The clerk typist is also responsible for manually maintaining the rock-bit inventory because that inventory has not been placed into the company's computerized inventory system. The clerk typist will also relieve the order data entry clerk and occasionally will relieve the sales service secretary.

8. The employees in dispute work primarily in the office portion of the company's premises. The stock attendant and chief stock attendant and the employees in dispute, as well as the other office and sales employees, are paid in accordance with the same company compensation plan, work an eight hour day and five day week, and receive the same holiday, vacation and benefits package.

9. Counsel for the respondent submits that the employees in dispute do not share a community of interest with the employees that parties agree are in the bargaining unit. He submits that the nature of their work, which is principally clerical, and the skills of the employees, are sufficiently dissimilar from the work done by the stock attendants for the Board to find that they do not have a community of interest. The same salary and benefits program applies to the employees in dispute and the employees that are agreed as being in the bargaining unit, and to all of the other employees at the respondent's premises, including other office and sales staff. Thus, counsel argues that the employees in dispute are no different than the other office employees of the respondent and share a community of interest with those employees rather than with the employees that the parties agree are in the bargaining unit.

10. The respondent's operations are divided into the Service Sales Division and the Original Equipment Manufacture (OEM) sales division. All of the employees for whom the applicant seeks bargaining rights are under the supervision of the supervisor - warehouse. In addition to those employees, the secretary of the service sales division is also under the authority of the supervisor - warehouse. The supervisor - warehouse reports to the District Manager, Service Sales Division, who is also responsible for two sales representatives in the service sales division. The manager of the OEM sales division is responsible for two sales engineers, a Field Representative Service Engineer, an Account Co-ordinator and a secretary.

11. The order analysts and the clerk typist work in the same area in an office adjacent to the warehouse. The order data entry clerk works in a separate office adjacent to the warehouse which is connected to the office in which the clerk typist and the two order analysts work. The office of the supervisor - warehouse is in that part of the premises and is also adjacent to the warehouse.

12. The other employees of the respondent work in offices around the perimeter of the office area and are not adjacent to the warehouse. The secretaries in the Service Sales Division and the OEM Sales Division, and the Account Co-ordinator work in an area inside the perimeter of the offices that are occupied by the sales representatives, engineers and managers.

13. Counsel for the applicant argues that the employees it seeks to represent share a

community of interest because their work functions are integrally related. They have common supervision and form a discrete portion of the respondent's operation. He further submits that the order analyst job, in particular, was created by reason of the introduction of new technology by the respondent, and that the work function of that job, that is, the movement of goods from the warehouse, is the same as it was before the introduction of that new technology. He further submits that the respondent has created a separate and easily defined work unit to perform the warehouse functions under the supervision of the supervisor - warehouse. Furthermore, there is no reason to distinguish between the stock attendants, including the chief stock attendant and the employees in dispute by reason of their wages and benefits since they all come under the same salary administration program. He also argues that the other employees of the respondent are not as closely related to the warehouse function, since they are primarily responsible for sales, secretarial and administrative functions, as opposed to the movement of goods from the warehouse.

14. Counsel for the respondent points out that the function of the respondent's operation is the movement of goods, that is, everyone employed by the respondent at its premises Mississauga is involved in seeing that the respondent's products are moved out of its warehouse, which in effect, is the sale of its products. Furthermore, the employees in dispute are involved in sales to some degree. Therefore, he submits that the Board should not distinguish between employees on the basis of their work function, but rather by the type of work they perform.

15. The determination by the Board as to whether the employees in dispute share a community of interest with the employees whom the parties agree are in the bargaining unit requires the Board to consider whether a unit that is comprised of those employees would be appropriate for collective bargaining or to put it another way, does the inclusion of the employees in dispute in the proposed bargaining unit make it inappropriate for collective bargaining. This concept has been expressed by the Board in *Adams Furniture Company*, [1975] OLRB Rep. June 491 in the following way:

"... Where a community of interest is lacking, there is the distinct possibility that the bargaining agent will not be able to reconcile the disparate interest groups within the unit. If the bargaining agent is not able to represent effectively all groups within the unit, there is a good chance that this will effect the viability of the collective bargaining relationship itself. Community of interest is determined by the consideration of a number of factors and undue significance should not be attached to any one of them."

16. The factors the Board has considered in assessing whether some employees share a community of interest with others has been set out in *Alma Paint & Varnish Company*, [1968] OLRB Rep. Sept. 551 as follows:



- “1. The respondent’s organization and administration.
2. Intermingling and interchange.
3. Geographic location of work.
4. Kinds of skills, responsibilities and interchangeability.
5. Conditions of employment.”

See also *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526; *Fildebrandt Precision Industries Limited*, [1983] OLRB Rep. March 361; *Lumonics Inc.*, [1985] OLRB Rep. March 442.

17. The focus of the Board in analyzing those factors has been described in *Fildebrandt Precision Industries Limited*, *supra*, at page 369:

“The factors identified in both *Usarco*, *supra* and *Alma Paints*, *supra*, to assist the Board in determining the community of interest deal in part with matters which lie at the very heart of collective bargaining. For example, if the conditions of employment are substantially different between an individual or group of individuals and another group, their combination in one bargaining unit may create such serious dissonance in collective bargaining as to make the efficient conclusion of a collective agreement without a labour strike less likely. The preamble of the Act indicates that the promotion of harmonious collective bargaining is one of the aims of the Act. The creation of an obviously unharmonious or a difficult to harmonize bargaining unit would not be a fulfilment of the Board’s mandate. The facts identified also ensure that there is an underlying unity of interests among the employees in the bargaining unit. Where one group has little work-related contact with another group or where the skills of one group are vastly different from another, there could be significant gaps in each group’s understanding of the other’s goals in collective bargaining and could create conflict within the bargaining unit. Obviously, no one factor can be identified as all important in every case nor can an absolute grading in importance among the facts be done because each work place can vary so greatly from another. For example, if differences in conditions of employment were ultimately determinative of community of interest, the compensation package would be manipulated to create distinctions where none, relative to collective bargaining, exist.”

18. The Board has historically separated office employees from plant or production employees on community of interest considerations. (*H. Gray Ltd.*, 55 CLLC 18,611) The Board, however, has included persons whose jobs are clerical in nature in production bargaining units by reason of their community of interest. In *Wakefield Lighting Limited*, [1965] OLRB Rep. May 143, the Board stated at 144:

“It is a well-established practice of the Board in determining the appropriateness of bargaining units of persons engaged in production as distinguished from the office bargaining units, to include in the production units employees in job classifications such as production schedulers, expeditors and material control clerks. These classifications may be included in the general description of ‘plant clerical staff’.

It is the Board’s practice to include such plant clerical staff with the production unit because of such factors as common supervision, the fact that they directly service the production unit, they are commonly associated with the production unit and in general their community of interest is with that unit. This functional coherence and interdependence is the reason for including such classifications in the unit determined by the Board to be appropriate in this matter.”

19. In this case, we are satisfied that a bargaining unit comprised of the stock attendants,

chief stock attendant and the employees in dispute would be appropriate for collective bargaining. Their salary and benefits program are the same and their work is all integrally related to the actual warehousing functions of the respondent. Furthermore, administratively, the employer has created a defined group of employees under the authority of the supervisor - warehouse to perform the warehouse function. As the Board noted in *Toronto General Hospital*, [1972] OLRB Rep. Jan. 33 at p. 34:

“While the nature of the employer’s organization is a relevant consideration in determining appropriate bargaining units, that is only one factor, *The Board of Health of the York - Oshawa District Health Unit*, [1969] OLRB Rep. June 340 at 346. An administrative unit of an employer’s organization may satisfy some criteria for appropriateness in the sense that it is a separate, identifiable and functional unit, but those factors are always subject to the judgment that bargaining units based on separate administrative units may unduly fragment an employer’s organization resulting in separate representation by a multiplicity of organizations for each administrative unit.”

(See also *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 at 271-72). The concern for fragmentation expressed by the Board in the *Toronto General Hospital* decision does not arise in this case since the respondent only has two administrative units in Mississauga.

20. The similarity of the compensation program for the employees, the respondent’s administrative structure, and the employees’ job functions persuades us that the employees in dispute share a sufficient community interest with the stock attendant and chief stock attendant to carry on viable collective bargaining. While the skills needed by the employees in dispute to perform their work are different than the skills used by the stock attendants, we do not believe that that factor outweighs the other factors which point to a community of interest among the employees. We do not disagree with the respondent’s assertion that the employees in dispute may share a community of interest with the other office and sales employees of the respondent. In our view, the employees in dispute could be included in either an office unit or in the bargaining unit that we have determined in this case is appropriate for collective bargaining. As the Board noted in *Hospital for Sick Children*, *supra*, at page 273:

“The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of “appropriateness”, with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate.”

21. The Board notes, for purposes of clarity, that the term office, sales, and service staff contained in the description of the bargaining unit set out in its June 11, 1985 decision does not include order analysts, order data entry clerk and clerk typist.

22. A final certificate will issue.

#### **DECISION OF BOARD MEMBER J. P. WILSON;**

1. I agree with the facts elicited in this case. As mentioned in the decision, employees in dispute could be placed in either the warehouse bargaining unit or with the office employees.

2. Since this is a warehousing operation and not a manufacturing plant, all employees in the building must be dedicated to the movement of the company products in and out of the warehouse.

3. Technological change through computerization has created one new job classification and, in general, moved the subject employees away from a pure warehouse function and closer to an office function. Possible changes may well bring them solidly into the ambit of the office employees.

4. For those reasons, I would not have placed the employees in dispute in the warehouse bargaining unit.

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**1020-85-EP Karel Kraan, Complainant, v. Custom Muffler Ltd., Respondent, v. Minister of the Environment, Intervener**

**Adjournment - Environmental Protection Act - Practice and Procedure - Whether Ministry of Environment entitled to participate in proceedings - Whether Board adjourning proceedings until prosecution in court complete - Policy re adjournment**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *F. C. Burnet* and *S. O'Flynn*.

**APPEARANCES:** *Karel Kraan* appearing on his own behalf; *Kevin Nearing* for the respondent; *John Swaigen* for the intervener.

**DECISION OF THE BOARD;** October 30, 1985

1. This is a complaint filed with the Board under section 134b of the *Environmental Protection Act*, R.S.O. 1980, c.141, as amended. Subsection (2) of that section prohibits employers from dismissing, disciplining, penalizing, coercing, intimidating or attempting to coerce or intimidate an employee because the employee "has complied or may comply with ..." any one of several acts, including the *Environmental Protection Act*, or the regulations thereunder. Section 134b gives this Board jurisdiction to inquire into a complaint that an employer has contravened subsection (2). As with similar provisions in section 89 of the *Labour Relations Act* and section 24 of the *Occupational Health and Safety Act*, the burden of proof that an employer has not contravened subsection 134b(2) of the *Environmental Protection Act* lies on the employer, and the Board has a broad jurisdiction to fashion a remedy if the employer fails to discharge that burden.

2. This complaint was filed with the Board July 23, 1985. In it, the complainant states that on June 22, 1985, the respondent's manager gave him an ultimatum to perform a certain job or find work elsewhere. The complainant says he considered that job illegal. In that connection he refers to subsection 21(3) of the *Environmental Protection Act*. He says he



refused to do the job and lost his employment as a result. The Board scheduled a hearing of the complaint for October 9, 1985, so advised the complainant and gave notice of the complaint and hearing date to the respondent. The respondent filed a reply in which it acknowledged a discussion on June 22, 1985, between the complainant and the respondent's manager about the provisions of the *Environmental Protection Act*, but denied terminating the complainant's employment, saying he had quit of his own volition.

3. Counsel for the Ministry of Environment attended at the Board's hearing on October 9, 1985, and sought the opportunity to participate in the Board's proceedings. He noted this was the first complaint heard by this Board under section 134b of the *Environmental Protection Act*, and submitted that the Ministry had an interest in ensuring that the protection afforded by that section was given a broad interpretation. In particular, he proposed to argue that the section protects an employee who refuses to do work in the honest belief that performance of that work would contravene one of the statutory or regulatory provisions mentioned in the section, even if it is later determined that that belief is legally incorrect. He proposed to lead or make available to the parties the testimony of certain witnesses who, he said, would establish that the complainant had been given an opinion by an official of the Ministry of the Environment that it would be illegal to do the work he was being asked to do.

4. Counsel for the employer opposed participation by the Ministry. He said that his client and the Ministry disagreed on the interpretation of section 21(3) of the *Environmental Protection Act*, and he expected that disagreement would be the subject of future court proceedings involving his client and the Ministry. When asked his position on the Ministry's request to participate, the complainant stated that counsel to the Minister was not representing him as his legal counsel. He said he thought the question before the Board would be the interpretation of subsection 21(3) of the *Environmental Protection Act*. He felt this Board should not "pre-judge" the situation, but should postpone its hearing until a ruling by a court of law had clarified the meaning of that subsection of the *Environmental Protection Act*. Treating this as a request for an adjournment, we asked counsel for the respondent whether he would consent. He said he would not. He observed that the matter before us was an employment relations matter which involved more than a mere interpretation of a provision of the *Environmental Protection Act*, and that the respondent was ready to meet the complaint as framed. We observed that this Board does not ordinarily adjourn scheduled proceedings except on the consent of all parties or for compelling reasons.

5. The complainant pressed his request for an adjournment. In the ensuing discussion, it emerged the complainant was concerned about any unnamed member of the Kingston police for who, he said, had been harassing his wife ever since that policeman had become involved in the investigation of the alleged violation of the *Environmental Protection Act*. The complainant said he feared further harassment if news of his testifying before the Board reached that policeman. He explained he would not have the same concern about participating in the contemplated court proceedings, since he understood the court would have some power to restrain the police officer in some way. Counsel for the respondent was unable to shed any light on this new matter. Counsel for the Minister advised the Board that he understood there were certain charges pending against a police officer with respect to activities the complainant had described to us. We observed that the power of courts to restrain unlawful harassment would surely be no different when the harassment resulted from testimony before the Board as when it resulted from testimony before a court. We also observed that harassment of the complainant or his wife as a result of the complainant's testifying before this Board might

well constitute a contempt which this Board would have the power to refer to the Divisional Court for punishment under section 13 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484. The complainant persisted in his request for an adjournment to which the respondent remained opposed.

6. After retiring to consider the submissions of the parties, we declined to grant the requested adjournment. In doing so, we observed that the issues placed before us by the complaint were not identical to those which would arise in a prosecution of the respondent employer for its alleged violation of the provisions of the *Environmental Protection Act*. In this complaint, the Board would be required to determine whether the complainant had been discharged, disciplined, penalized, coerced or intimidated by his employer or the subject of an attempt by his employer to coerce or intimidate and, if so, whether that employer action was motivated in any way “because the employee has complied or may comply with ...” one of the statutes or regulations referred to in section 134b. A determination that the Ministry’s interpretation of subsection 21(3) of the *Environmental Protection Act* was correct would not conclusively establish the employer’s liability under section 134b, as it would still be necessary to determine whether there had been some employer action against the complainant and, if so, whether that action had been motivated by the employer’s belief that the complainant would comply with that interpretation of the Act. On the other hand, if the words “has complied or may comply with ...” require only proof that the employee acted or proposed to act in accordance with an honest belief that to do otherwise would result in his violating a provision of one of the enumerated acts or regulations, then a successful challenge by the respondent of the Ministry’s interpretation of subsection 21(3) of the Act would not necessarily result in the dismissal of this complaint. The Legislature’s assignment to this Board of the jurisdiction to entertain complaints under section 134b of the *Environmental Protection Act* must reflect a desire that the issues raised thereunder be examined and dealt with from a labour relations perspective by a tribunal with experience in assessing dealings between employers and employees, and particularly in distinguishing premise from pretext in the explanations offered by employers and employees for their behaviour toward one another. It was surely the Legislature’s expectation that the Board would entertain complaints under section 134b in accordance with its existing practice and procedure in like matters arising under section 89 of the *Labour Relations Act* and section 24 of the *Occupational Health and Safety Act*. So far as it is able to do so, this Board deals expeditiously with matters brought before it, because expedition is particularly important in labour relations matters. For that reason, the Board does not grant adjournment of matters which come before it except on consent or for compelling reasons. We were and are of the opinion that we should take the same approach to proceedings under section 134b of the *Environmental Protection Act*. We concluded that we should not await the outcome of the parallel court proceedings, and that the fear of illegal and retaliatory conduct by a third party to the Board’s proceedings was not, at least in these circumstances, a sufficient reason to warrant adjournment. Accordingly, we denied the requested adjournment.

7. As this was the first matter to come before this Board under section 134b of the *Environmental Protection Act*, and in view of the obvious interest of the Ministry of the Environment in the scope of protection afforded by section 134b of the *Environmental Protection Act* to workers who rely on its officials’ interpretations of other provisions of that Act, we granted the Minister of the Environment status as an intervener in these proceedings.

8. In the face of the Board’s rulings, the complainant renewed his request for an adjournment. He articulated for the first time a concern that he was not represented by a

lawyer. The Board inquired whether he had made efforts to retain a lawyer. He said he had spoken to a lawyer and concluded that he was unable to afford a lawyer's services. He said he did not qualify for legal aid. He stated he might be able to afford legal representation if the Board's hearings were conducted in Kingston. However, he had not asked the Registrar to have the hearing of this complaint conducted in Kingston, although he had known for at least a week prior to the hearing that such a request must be addressed to the Registrar. He was not sure whether he would have legal representation at a hearing if it *were* held in Kingston. In any event, he made it clear that he would not participate in a hearing in Toronto or in Kingston if that hearing took place before the court proceedings discussed earlier. The Board confirmed its ruling that no adjournment would be granted. The complainant then asked whether he could withdraw his complaint.

9. Before dealing with the complainant's request to withdraw his complaint, the Board cautioned him that if he did withdraw the complaint he might not be able to have its subject matter dealt with at a later time. The Board attempted to reassure the complainant with respect to the matters about which he had expressed concern. The complainant said he still wished to withdraw his complaint. Accordingly, the Board's inquiry into this complaint was and is terminated.

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**1246-85-R G.K.L. Industries Employee's Association, Applicant, v. G.K.L. Industries Ltd., Respondent**

Certification - Trade Union - Trade Union Status - Employees not admitted to membership - Constitution not adopted - Officers not elected by members - No union status - Union constitution excluding probationary and casual employees from membership - Board policy not to certify where employees in unit ineligible for membership

**BEFORE:** *R. A. Furness*, Vice-Chairman, and Board Members *M. Eayrs* and *P. Grasso*.

**APPEARANCES:** *Gary Ross* and *Dan Post* of the applicant, no one for the respondent.

**DECISION OF THE BOARD;** October 7, 1985

1. This is an application for certification. In a letter dated August 19, 1985, the Registrar notified the applicant that the Board had not previously found the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Registrar further advised the applicant that if the Board's information was correct it must be prepared at the hearing scheduled in this matter to satisfy the Board in accordance with its usual practice that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.



2. Having regard to the representations before it, the Board finds that all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

3. Daniel Post and Gary Ross appeared at the hearing and gave evidence concerning the steps which led up to the adoption of the constitution of the applicant, the signing of membership cards and the election of officers of the applicant. All notices which are subsequently referred to were posted in the employees' lunch room. All meetings which are subsequently referred to were held at the same location. Mr. Post secured the permission of the respondent to use the lunch room for the meetings. According to his testimony, he was vague when explaining why the employees wanted to conduct meetings in the lunch room.

4. In April of this year Mr. Post posted a notice of an organizational meeting to be held at 4:30 p.m. on the same day. At that meeting, Mr. Post introduced to the employees who were present the idea of forming an association to regulate relations between the employees and the respondent. Mr. Post solicited the views of the employees as to whether they were in favour of forming such an association. This meeting was the result of "months of small talk in groups during lunch hours". The response of the employees indicated support for such an association. Between eighty and ninety per cent or twenty-one or twenty-two of the employees of the respondent were present at the meeting. In the days which followed this meeting, Mr. Post visited his local library in order to learn about labour law and constitutions of associations.

5. Notice of a second meeting was posted and held on Saturday, May 11. On this occasion about nine employees were present. At that meeting Mr. Post introduced the idea of the need for a constitution and other legal requirements in order to become an association. From that date on, Mr. Post and Mr. Ross commenced work on preparing a draft constitution. The draft constitution was posted in the employees' lunch room between May 21 and May 22. A notice of a meeting to be held on May 22 was also posted on May 21. The meeting was held on May 22 and from that time onwards, Mr. Post and Mr. Ross started to keep accurate records of the affairs of the association. At the meeting on May 22, the proposed constitution was read to the eighteen employees who were in attendance. The constitution was adopted unanimously by a show of hands. Those who were in attendance left the meeting with the idea that they would require more self-regulation and amendments to the constitution.

6. Employees of the respondent signed applications for membership in "GKL's Employees Association" and paid one dollar on account of initiation fees. These membership cards were signed as follows:

April 26 - 14 cards signed  
 April 29 - 6 cards signed  
 May 28 - 1 card signed  
 June 10 - 1 card signed  
 August 14 - 4 cards signed  
 August 15 - 1 card signed.

Mr. Post and Mr. Ross considered re-signing all the members after the constitution had been adopted. However, they concluded that this was not the right thing to do. In accordance with

the advance notice requirements of the constitution, notices were posted in connection with elections to be held on June 5. A meeting for nominations had been held on May 22. Nominations were received for the positions under the constitution of chairman, vice-chairman, secretary-treasurer and four communications representatives. Mr. Ross was acclaimed as secretary-treasurer. The other positions were filled following elections by secret ballot - including the election of Mr. Post as chairman. Twenty-three persons were present at the meeting on June 5. A further meeting was held on July 9 before the respondent's shutdown. At that meeting, it was established that there would be no dues until certification. It was also decided to conduct a fifty-fifty lottery to cover any expenses which might arise prior to certification.

7. The employees became members in the "GKL's Employees Association" and not members in the applicant. Moreover, the membership cards were for the most part signed at a time when there had not been a purported adoption of the constitution which was placed in evidence before the Board. The Board finds that the constitution was neither adopted nor ratified by members of the applicant. The election of officers was also accomplished by persons who were not members of the applicant.

8. As the Board stated in *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472, the following steps should be taken by an organization which is required to establish its status as a trade union within the meaning of section 1(1)(p) of the Act.

- (1) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of relations between employees and employers) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such a meeting should be admitted to membership;
- (4) the constitution should be adopted or ratified by the vote of said members;
- (5) officers should be elected pursuant to the constitution.

On the evidence before this Board, it appears that the first and second steps were taken in endeavouring to establish the applicant. However, it appears that steps three, four and five were not followed. The employees became members of a non-existent association and there was no act of ratifying or confirming any membership in the applicant after the applicant came into existence. In these circumstances, the applicant has not been properly formed as a trade union within the meaning of section 1(1)(p) of the Act. At the time the constitution was adopted, the applicant did not have members. A trade union commences its existence as a trade union when the adopted constitution is ratified and confirmed by its members. To complete the foundation of the applicant as a trade union, it was therefore necessary for the membership to ratify or adopt the actions taken at the earlier meetings. This was not done by the members of the applicant. The Board finds that the necessary procedural steps were

not completed in order to bring the applicant into existence. See, for example, *Proctor-Lewyt Division of SCM (Canada) Limited*, [1969] OLRB Rep. Sept. 760. The constitution was not adopted by members and the officers were not elected by members.

9. The Board desires to refer to a provision of the applicant's constitution which gives the Board some concern. Article I of the constitution states:

Article 1      Eligibility for Membership

Section i      All Hourly Rated Employees working within the Factory are eligible for membership. Temporary workers (Casual Labour) are ineligible for membership (emphasis supplied).

Section ii      No Employee shall attain membership status until they have completed the Probationary Period required by Management.

The Board has consistently refused to certify trade unions when its constitution renders ineligible for membership some or all of the employees it would be required to represent if certified. The Board has described the appropriate bargaining unit in paragraph two. The Board does not exclude casual or temporary or probationary employees from appropriate bargaining units. See, for example, *Gaymer & Oultram (1954) 54 CLLC 17,073* and *The National Cash Register Company of Canada, Limited*, [1969] OLRB Rep. June 371. The rationale for that approach is that if the trade union negotiated a collective agreement which made membership in it a condition of employment (as permitted in certain circumstances by section 46 of the Act), such constitutional membership restrictions could result in the discharge of employees whom the trade union is required to represent. The applicant by its constitution cannot take into membership all of the persons who are the subject of this application.

11. For the foregoing reasons, this application is dismissed. This decision does not prevent the filing of a new application where the constitution meets the requirements set forth in this decision.

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**2099-84-R** Syndicat Quebecois De L'Imprimerie Et Des Communications, Local 145, Applicant, v. **Journal Le Droit**, division du groupe UniMedia Inc., Respondent

**Dependent Contractor - Practice and Procedure - Board finding ten drivers examined to be dependent contractors - Limiting submissions why not representative - Invitation not opportunity to relitigate status of ten drivers ruled upon or to indirectly seek reconsideration**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members W. H. Wightman and S. O'Flynn.

**DECISION OF THE BOARD;** October 4, 1985

1. By decision of the Board dated September 6, 1985, the Board found that the ten



drivers examined by the Board Officer were dependent contractors within the meaning of section 1(1)(h) of the *Labour Relations Act*. Although the respondent conceded that the general trend of any examination of the remaining sixteen drivers would be the same, the respondent nonetheless sought those further examinations. In the September 6, 1985 decision, the Board directed that the parties make written representations by September 20, 1985, as to whether additional examinations should be conducted.

2. It is appropriate to here set out in full the submissions of the parties, in the order received.

#### LAW OFFICES OF NELLIGAN/POWER

September 12, 1985

This letter is written as a result of the Board's direction and its Decision on this matter that the parties make representations as to whether additional examinations should be conducted.

The Applicant's position on this matter is that no further examinations are required. As even the Respondent has conceded the general trend of any examination of the remaining drivers would be the same. All of the points which the Board found significant in arriving at its Decision are found throughout the evidence given by the ten witnesses already called. For this reason, it is submitted that no useful purpose could be served by holding further examinations.

In our Submission the only purpose that could be served in the holding of further examinations would be to delay the Board's final determination on this very important issue. To date, through no fault of anyone, almost a full year has past since the Application was first submitted to the Board. This is extremely unfortunate from a Labour Relations point of view. The employer, the Union and more importantly the employees who will ultimately be in the bargaining unit have been in this "in between" state for far too long.

It is for this reason that we would ask that the matter be relisted as early as possible in order that a final decision can be rendered.

Yours Sincerely,

"Catherine H. MacLean"

cc: D. Desautels  
Gilles LeBlanc

\* \* \*

#### GOWLING & HENDERSON

September 17, 1985

We wish to advise that we have been retained to represent the Respondent in the above matter and we would ask that you amend your records accordingly.

In its decision dated September 6, 1985, the Board directed the parties to submit

written representations as to whether additional examinations should be conducted in this matter. In this report, we note that although the Respondent has acknowledged that the general trend of the testimony of the remaining 16 drivers would be similar to that given by those who have already testified, it has indicated that there would be some variation with respect to the number of hours worked and to additional employment. The Respondent proposes that the remaining drivers be examined and that the examination of Francois Belanger be resumed. These examinations will touch upon certain matters which, it is submitted, will have a significant bearing on some of the Board's factual determinations in its interim report as well as on the ultimate decision to be made on the matters at issue. The substance of the additional facts and evidence which should be put before the Board directly bear upon three of the factors which according to the Board, favoured a finding of a dependency relationship, namely, entrepreneurial activity and economic mobility, the selection and use of substitutes and the financial arrangements between the Respondent and the subject drivers.

With respect to the factor of entrepreneurial activity and economic mobility on the part of the drivers, 10 additional drivers will testify that they have other employment in addition to the work which they perform for the Respondent. This evidence will also deal with the nature of such additional employment as well as with the consistency and the hours of the work performed by these drivers for other employers.

In addition, the Board should be made aware of a detailed survey of the hours spent by all of the drivers with respect to the work which they performed for the Respondent during the weeks of July 15th and July 22nd of this year. In this respect, during 9 working days in this period, the Respondent recorded the time of departure of each driver from its premises and the time each driver completed his route. This survey will provide a representative sample of the time taken by each driver to complete his route or routes and will largely contradict the evidence of the drivers who have already testified as to these matters. It will be our submission that this evidence should be preferred to that of these drivers.

The Board should also be made aware of evidence which will clearly demonstrate that all drivers with out-of-town routes also perform the function of delivering papers directly to subscribers while completing their assigned route thereby extending the time taken to complete their route. It will be submitted that such additional time should not be counted in the total time taken by these drivers to complete their respective routes and this evidence will have a significant bearing on the Board's findings in this respect.

In addition, the Board should be made aware of certain evidence having a direct bearing on whether, in cases where a given driver covers two routes, the time spent in completing each route should be considered separately and not in combination as the Board has apparently concluded in its interim report (see paragraph 20). This evidence will relate to the policy and the practice of the Respondent in granting more than one route to a given driver as well as to its reasons for doing so.

It is submitted that the thrust of the evidence outlined above will demonstrate that the performance of the duties of the drivers in question cannot be viewed as an impediment and in fact is not an impediment in the majority of the cases, to the drivers' pursuing other financial opportunities.

With respect to the selection and use of substitutes, there are additional facts which are not included in the interim report of the Board Officer which will show that during the last five years, the instances where the Respondent actually intervened to find a substitute constitute a minor percentage of the total substitutions which occurred during this period. This evidence will demonstrate that in effect, the general rule is that the driver is solely responsible to find and pay his own substitute. In cases where the substitute has completed a particular route on a given day, the Respondent nevertheless pays its driver unless otherwise specifically directed by that driver. It will be submitted that the Board's determination with respect to this factor in its interim report (see paragraph 18), was based on minor exceptions to the general rule and that the above additional facts will weigh quite significantly in determining whether this factor points more towards a finding that the drivers in question are independent contractors.

As to the last factor set out above, that of financial arrangements, the Board should be aware, in greater detail, of the manner in which increases in remuneration are determined for [sic] time to time. The facts relating to this matter will show that although an increase in the price of gasoline may serve to initiate such a process and also be a factor which is taken into account during such a process, the determination of a given increase is based upon other factors which are evaluated individually for each route and each driver resulting in variations in the amounts of increase in remuneration granted to each driver at any given time. It is submitted that these additional facts will point strongly to a finding that rate increases are to some extent "negotiated" in the case of each individual driver.

We should note that most of the above additional evidence would be best presented through the witness Francois Belanger who has the most direct knowledge of these matters. The facts as to other employment held by drivers will become apparent from the examination of the remaining drivers. We realize that Mr. Belanger has already been examined in this matter. However, we submit that the facts presently before the Board on the above matters are insufficient to allow the Board to properly and accurately determine the matters at issue and to arrive at a determination which is consistent with the realities of the Respondent's operations and those of its drivers.

Should the Board accede to the Respondent's request, we are of course at its disposal in determining the time and manner in which further examinations can be conducted most expeditiously and conveniently.

"Robert W. Cote"

c.c.: Ms. Catherine Maclean  
Nelligan Powers  
Barristers and Solicitors

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#### LAW OFFICES OF NELLIGAN/POWER

September 24, 1985

This letter is in response to the letter sent by Robert Cote to the Board on September 17th, 1985.

I would ask you to convey to the Board that we object in the strongest possible terms to the course of action that Mr. Cote is proposing.

I was disappointed at the suggestion that we needed to hear from the balance of the members of the bargaining unit, particularly in view of the Board's questioning of the employer's former counsel Mr. White prior to the commencement of our argument. It was clear in my submission, from his statement that the desire on the part of his clients to hear from more witnesses was made for the record only (which he repeated on several occasions) that there was no serious wish to hear the balance of the evidence. As the Board noted Mr. White went so far as to concede that the general trend of the evidence would be the same for all of the remaining employees in the bargaining unit with some small variations. The employer



was so confident of being successful in the arguments which it had to make in view of the Citizen case that there was nothing more than a pro forma expression of a desire to hear from more employees.

There was no indication at that time that the parties had additional evidence from Mr. Belanger which for some reason they had not brought out during his lengthy examination as the Respondent's witness. The detailed survey of the hours of work sent by the drivers referred to on page 2 of Mr. Cote's letter had already been underway for more than a week by the time we argued our case before the Board, yet Mr. White gave no indication that the Respondent felt additional evidence concerning the hours of the employees was important. No representations were made concerning the need for further evidence despite the fact that the Respondent had been aware since February 7th, 1985 when the hearings ended and certainly since the interim report was received in May of 1985 exactly what testimony had been given by the individual drivers concerning their hours of work. If the Respondent felt it necessary to do so, the survey could have been conducted long before preliminary argument was made on the basis of the report. I would note that Mr. Wheatley suggested calling a halt to the examinations only insofar as other members of the bargaining unit were concerned. The employer never indicated that it had any other evidence from any other person nor even any further evidence from Mr. Belanger at any time until they realized that they had not been successful before the Board on the preliminary question.

I indicated that I was disappointed by the Respondent's approach in requesting examination of the rest of the bargaining unit but I cannot say that I was surprised. The delay that will be caused by the further ten examinations and the time required for the preparation of another extremely lengthy interim report will delay the certification of my client.

I was amazed, however, by the suggestion that the Respondent should be permitted to bring witnesses other than the remaining members of the bargaining unit to testify on its behalf. Not only, as I pointed out earlier, was this never requested at any time prior to the issuance of the interim report but it is clear that there is only one reason to re-open Mr. Belanger's evidence and that is to have him specifically refute each fact as found by the Board after consideration of the evidence overall. Prior to the Board having written its decision, Mr. Belanger simply gave evidence like everyone else in responding to questions posed to him. Now that the Board has considered the matter and the employer has had a chance to see the areas of weakness in its case, it is asking for this extraordinary opportunity to buttress its case.

What Mr. Cote is suggesting amounts to nothing more than a move to reconsider the Board's decision on the basis of evidence that was all available at the time the initial hearing took place. In view of the pro forma request by Mr. White to hear from more members of the bargaining unit I wholly committed our case before the Board. My argument was based on the evidence as it had been presented. So was Mr. White's. Now Mr. Cote in this unprecedented move is seeking to be in a position to "correct" the findings of fact that were made by the Board. This is not only contrary to the Board's practice if this were an application for reconsideration but would also be grossly unfair to my clients in their attempt to present their arguments to the Board and have them adjudicated upon.

Yours sincerely,

"Catherine H. MacLean"

cc: Gilles LeBlanc  
cc: Denis Desautels  
cc: R. Cote

3. The Board's decision of September 6, 1985 did not invite submissions as to the correctness of the findings of fact and law contained in that decision. In the Board's view, several of the respondent's representations address matters which can only be raised in a request for reconsideration. And, of course, any such reconsideration request would be considered in accordance with the Board's usual practice with respect to such requests. That is, as stated in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185 at ¶4:

To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC 16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC 14,132, (Ont. Div. Ct.).)

4. What the Board was requesting were submissions as to why the sixteen remaining drivers should be examined, as to why the ten already examined should not be considered representative of the twenty-six drivers. Those further examinations cannot be used as an opportunity for the respondent (who is seeking those examinations) to split its case or repair deficiencies with respect to the ten examinations already conducted or to reopen its examination of the witnesses already heard. The respondent called Belanger during the initial examinations and was afforded full opportunity to question that witness and Belanger's evidence was fully completed at that time. Thus, the Board is not prepared to permit the respondent to recall Belanger, even if further examinations should be directed.

5. In the Board's view, the proper scope for any examinations of the remaining sixteen drivers would be to establish that the ten drivers already examined are not fully representative of the drivers in the bargaining unit for which the applicant seeks certification. The Board is prepared to permit the respondent the opportunity to detail for each individual all the facts which it wishes to prove in respect of each of the remaining drivers which the respondent wishes to have examined but *only* insofar as those facts are different from the circumstances of the ten drivers already examined. To give but one example, facts concerning the financial arrangements between any of the sixteen drivers and the respondent cannot be detailed if such arrangements do not differ from the financial arrangements between the ten drivers already examined and the respondent. In the Board's view, this direction permits the respondent to assert facts unique to any or all of the sixteen drivers but precludes further examinations as a substitute for reconsideration or as a vehicle for relitigating matters already heard and determined by the Board.

6. The Board hereby sets October 21, 1985 for receipt of the facts which the respondent intends to prove (as circumscribed by paragraph 5 above) together with complete representations as to why, even assuming those alleged facts were true, the Board should reach a different conclusion with respect to the status of any of the remaining sixteen drivers as dependent or independent contractors. A copy of the material filed with the Board pursuant

to this direction shall be forwarded concurrently to counsel for the applicant. The applicant shall have a further period of two weeks to respond to that material, including any agreement on fact, again with a copy to counsel for the respondent.

7. If the Board directs that further examinations should be conducted with respect to any or all of the sixteen drivers, the respondent will be confined to eliciting those facts alleged in the material submitted.

8. This matter is hereby referred to the Registrar.

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**2306-84-R Canadian Union of Public Employees, Applicant, v. Kinark Child and Family Services, Respondent, v. Group of Employees, Objectors**

**Bargaining Unit - Employee - Househeads at therapeutic homes having control and power of effective recommendation over other employees - Not employees - Whether child care teachers having community of interest with other unit employees**

**BEFORE:** *Paula Knopf*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

**APPEARANCES:** *Helen O'Regan* for the applicant; *Brian P. Smeenck* and *Barbara Wade* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD;** October 25, 1985

1. This case involves an application for certification. An interim certificate was issued by the Board on December 21, 1984 and then later amended by decision of January 16, 1985 which resulted in the interim description of the bargaining unit as follows:

all employees of the respondent at Thunder Bay, Ontario, employed in the respondent's native program, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, staff training co-ordinator, secretary co-ordinator-personnel, office staff, maintenance staff, child care teachers employed in the cultural awareness center, persons employed for not more than 24 hours per week and students employed during the school vacation period (hereinafter referred to as bargaining unit #1) and all employees of the respondent in Thunder Bay, Ontario, employed in the respondent's non-native program save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, staff training co-ordinator, secretary co-ordinator-personnel, office staff, maintenance staff, child care teachers employed in the



cultural awareness center, persons employed for not more than 24 hours per week and students employed during the school vacation period (hereinafter referred to as bargaining unit #2).

2. Further, in the Board's original decision of December 21, 1985 five items were identified as being in dispute between the parties and thus the Board directed a Labour Relations Officer to enquire into those issues and report to the Board. The Labour Relations Officer and the parties were able to reach agreement on three of the five areas in dispute, but were unable to resolve the following two issues:

- (1) the request of the respondent for the exclusion of "househeads" on the grounds that they exercise managerial functions; and
- (2) the request of the representative of the group of objecting employees that "child care teachers employed in the cultural awareness centre" be excluded on the basis that those persons do not share a community of interest and ought to be represented in their own bargaining unit.

3. Following the release of the Labour Relations Officer's report, counsel for the employer requested that the Board hold a hearing in order to hear representations as to the conclusion which ought to be reached as a result of the report on the two issues which remained in dispute. On the same day, the respondent union advised that it did not desire a hearing before the Board but instead forwarded written submissions. The Registrar scheduled the matter for hearing on September 23, 1985. All parties including the objecting group of employees were given notice of the hearing. However, no one appeared on behalf of the objectors.

4. The first issue to address is whether the employees in the classification of "househead" should be included within the bargaining unit as "employees" within the meaning of the Act, or whether they ought to be excluded because of the exercise of managerial powers.

5. The evidence establishes that therapeutic homes are operated by the employer with the object of providing care for children in a setting that is as close as possible to a healthy family home situation. The homes are usually staffed by three child care workers and two night relief staff as well as the househead. The househead works together with the rest of the staff, with the same hours, under the same conditions and participates directly in child care. The homes are under the direct managerial control of the Native Programme Residential Supervisors and the Thunder Bay Programme Supervisor. The evidence makes it clear that the househeads try to operate on a consensual basis with the staff arranging scheduling and work duties co-operatively as far as possible. Thus, the position of the respondent union was that the househead should be viewed as a "team member" who is there to provide direction to other members when a consensus cannot be achieved. Further, the powers of the househead would be always subject to review by the residential supervisor and/or the programme manager.

6. However, there was also extensive evidence outlining the extent of "power" or authority that is vested in the househeads. With respect to hiring, the househeads play a significant role. Initially, prospective employees are interviewed by senior members of management and, if they appear to be suitable, are sent into a family home for a three-day

observation period. During that period, the prospective employee is assessed by the househead and the rest of the staff. But at the end of the three-day observation period the househead is able to make a recommendation to the supervisor as to whether the prospective employee should be hired or not. The evidence establishes that the house head's recommendation has always been followed and that management has never overridden any recommendation of the househead with regard to hiring.

7. Once hired, employees have a probationary period. When the three-month probationary period has come to an end, a decision has to be made as to whether a person should be taken on to full-time staff. Again, the househead is called upon to make a recommendation in this area. Similarly, the househead's recommendation has always been followed.

8. With regard to discipline and discharge, the evidence establishes that the househeads have issued formal discipline to child care workers in their homes and have had significant input into the question of discharge. Examples of disciplinary letters were entered as exhibits that had been signed by househeads. Further, a notice of discharge signed by a househead was entered into evidence. The evidence also revealed a situation where, on the recommendation of the househead, a decision to issue a suspension rather than a discharge was taken by management in the face of a serious act of misconduct which would normally lead to automatic discharge.

9. Another function of the househead is to participate in the performance evaluation of child care workers in their individual homes. These evaluations are kept on file and impact on employees' futures with the employer.

10. The househeads also have a large role to play in the scheduling of the child care workers including the allocation of overtime and the decision to grant time off. It is clear that the homes tried to work out schedules on a co-operative basis allowing for the staff's personal needs and lifestyles as much as possible. However, if full co-operation cannot be achieved, it is ultimately up to the househead to decide schedules. Employees are then required to fill out time sheets on a daily basis and these are checked and signed by the househeads at the end of each pay period. Paycheques cannot be issued without the signature of the househead which verifies the hours. However, it is true that management has often reduced the number of hours' payment despite approval by the househead. When casual time off is desired, the househead is the one who approves this. Further, the househead would have the power to grant a leave of absence under two weeks' duration on his or her own.

11. The applicant union describes the househead's duties as "consultation or input" as opposed to actual decision making. It was submitted that rather than having a power of "effective recommendation" or "independent managerial authority", the househeads instead "engage in occasional participatory management with the real managers". It was submitted that this should indicate that any supervisory activity is simply incidental to the primary task of providing child care services together with their colleagues who are the child care workers.

12. In contrast, the respondent submits that the evidence establishes that the househeads exercise "effective control" over the employees, i.e., the child care workers who they supervise because they have the ability to make other decisions or effective recommendations in areas that materially affect the economic lives of the employees.

13. In order to decide this issue, the Board has indicated in cases such as *The Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38 and *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 that we should examine issues such as hiring, discipline and discharge, performance evaluation, wage increases, scheduling, including time off and overtime, and the nature of the particular business or the employer's organizational scheme. In addition, the Board is always concerned about whether the inclusion of certain persons within the bargaining unit would put them in a position of a conflict of interest with the other people in the unit.

14. In this case, the Board concludes that the househeads must be considered to be holding a managerial position because they do possess control and effective powers of recommendation over the other workers in the house. Their ability to discipline and indeed discharge employees is the most startling example of this. In addition, their ability to make effective recommendations with regard to hiring, achievement of probationary status and annual evaluations is also the exercise of a managerial function. We are satisfied that their involvement goes beyond mere consultation or input even though decisions are often made together with other members of management. But far more importantly, their ability to make effective recommendations or indeed make the ultimate decisions themselves in this area puts them in an irreconcilable conflict of interest with the other employees in the unit. Such a conflict of interest would make it impossible for them to fulfil all their duties if they were considered to be members of the bargaining unit. For all these reasons, the househeads must be excluded from both bargaining units.

15. The next issue for the Board to address is the question of whether the child care teachers employed in the Cultural Awareness Centres should be excluded from the bargaining unit. It was the position of both the applicant and the respondent that this group of employees should be included in the bargaining unit. However, the group of objecting employees took the position that the child care teachers did not share a community of interest with the rest of the unit and ought to be represented in their own bargaining unit.

16. The Board did not have the benefit of any submissions from the objecting employees who were seeking the separate bargaining unit. However, the Board has been able to review the evidence carefully and consider the submissions made on behalf of the applicant and the respondent.

17. The Board notes that the applicant and the respondent had agreed early in these proceedings to establish separate units for the "native" and "Thunder Bay" programmes for the stated reason of taking into consideration the "substantial cultural content of the native programme and the unanimous desire of all parties to protect the cultural integrity of the [native] programme." It was the position of both the applicant and the respondent that the child care teachers and the child care workers in the native programme shared a community of interest and to separate them into a further unit would lead to unwarranted fragmentation, jurisdictional disputes and difficulties in administration dealing with layoff, recall, transfer and seniority.

18. In assessing this issue, the Board has applied the traditional indicia set out in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 which include:

- (1) nature of the work performed;



- (2) conditions of employment;
- (3) skills of the employees;
- (4) administration;
- (5) geographic circumstances;
- (6) functional coherence and interdependence.

19. We note that the native programme is designed to provide both residential and non-residential therapeutic services to native children and their families. This involves the residential treatment programme, the non-residential treatment programme and the Cultural Awareness Centre. The residential treatment programme is staffed by child care workers and night relief staff. The non-residential programme is staffed by "family workers" at the Cultural Awareness Centre. The children for the residential and non-residential programmes attend school which is designed to cope with their special situations. It is here that the child care teachers carry out their functions. The teacher's job is to provide child care from the non-residential aspects of the programme or for those in the residential programme who require a high ratio of staff attention. They also provide care, safety, programming of activities and are involved in counselling. They work together with the child care workers in assessing the needs of the situation of the children. While the child care teacher's focus is primarily in the area of education, the child care worker's focus is to provide a therapeutic and normalized home life.

20. The evidence establishes that the conditions of employment are very similar for the child care teachers and the other members of the bargaining unit. While they may work in very different settings, the hiring procedure is the same and the respondent applies the same policies with regard to pay increases to all the other employees insofar as salary scale and fringe benefits are concerned. The child care teachers work the same number of hours per pay period and are paid on the same overtime basis as other members of the bargaining unit. All personnel matters are administered through the respondent's central Thunder Bay Office. It is true that the Cultural Awareness Centre is separate from other areas of the respondent's operation. However, it is to be remembered that all the respondent's therapeutic homes are geographically separate. Thus, this does not appear to the Board to be a significant factor, especially in the light of the fact that there is no suggestion that the geographic separation itself ought to result in a separate bargaining unit.

21. The Board also notes that there is a great deal of exchange between the child care teachers and the child care workers with regard to advising each other on difficulties or significant areas of concern with the child on a daily basis. In addition, when required, the child care worker will assist a child care teacher at the Cultural Awareness Centre to meet the needs of the individual children. Employees in the child care worker, child care teacher and relief staff classifications are able to fill in for each other as required.

22. The above does not amount to a complete review of all the evidence regarding the child care teachers in the Cultural Awareness Centre and the issue of whether they ought to be included in the bargaining unit. However, it is sufficient to illustrate that they must be seen

to share a community of interest with the other members of the bargaining unit which the parties have described as bargaining unit #1. We can see no cogent reason to separate these employees from the rest of the group which provides the services to the children on behalf of the employer. To separate them, would cause unnecessary fragmentation and would render impossible the process of collective bargaining and collective agreement administration.

23. Therefore, because we have found that there is a community of interest and we can see no reason to create separate units, we conclude that the child care teachers ought to be included in the bargaining unit which the parties have described as bargaining unit #1.

### Conclusion

24. As a result of the foregoing, the Board orders that the bargaining units be described as follows:

All employees of the respondent at Thunder Bay, Ontario, employed in the respondent's native program, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, househeads, staff training co-ordinator, secretary co-ordinator-personnel and office staff (hereinafter referred to as bargaining unit #1), and all employees of the respondent in Thunder Bay, Ontario, employed in the respondent's non-native program, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, staff training co-ordinator, secretary co-ordinator-personnel, office staff and househeads (hereinafter referred to as bargaining unit #2).

For the purpose of clarity the Board notes that the term "supervisor" includes househeads, school co-ordinator, administrative assistant, supervisor of residential services, and family support co-ordinator."

25. Formal certificates will now issue to the applicant with respect to bargaining units #1 and #2.

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**0455-85-R** United Steelworkers of America, v. Applicant, **Laidlaw Wire of Canada, Ltd.**, Respondent, v. Group of Employees, Objectors

Certification - Membership Evidence - Petition - Practice and Procedure - Whether signatories to counter-petition understood nature of document - Employee terminating employment before terminal date - Whether card signed before termination given weight - Employee borrowing dollar from fellow employee and repaying same - Whether non-pay - Whether failure to disclose in Form 9 irregularity

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *A. Grant* and *S. O'Flynn*.

**APPEARANCES:** *Brian Shell, John Harkins and Doug Hart* for the applicant; *William R. Watson, David T. A. Cote and Jalal Hadibhai* for the respondent; *Muezettie-Betty Bonomo, Kerry Lyn Hill and Edelrand Falzon* for the objectors.

**DECISION OF THE BOARD;** October 31, 1985

1. The name of the respondent is amended to "Laidlaw Wire of Canada, Ltd."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. There were seventeen employees in the bargaining unit at the time the application was made. The applicant filed membership evidence in respect of ten of those employees, in the form of combination applications for membership and receipts. The objectors filed with the Board a petition in opposition to the certification of the applicant, bearing the signatures of eight employees, one of whom had earlier signed a membership card in the applicant (and paid the required initiation fee). The applicant also filed with the Board two counter-petitions, signed by a total of ten employees, one of whom had earlier signed a petition after joining the applicant. The heading on the counter-petitions reads as follows:

The undersigned employees of LAIDLAW WIRE OF CANADA LTD hereby revoke our support for any petition against the United Steelworkers of America and hereby reaffirm our allegiance to the United Steelworkers of America and voluntarily express our desire that the United Steelworkers of America be certified as our bargaining agent.

6. As noted by the Board in *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, at paragraph 38, the Board has entertained counter-petitions since at least 1957. Thus, the Board has a well established practice of recognizing such documents (which are also known as "revocations"), provided that they are filed in a timely fashion, and provided that there is sufficient evidence of the circumstances of their circulation that the Board can be satisfied that they represent a voluntary statement of employee wishes. If a person



who has signed both a membership card and a petition subsequently voluntarily reaffirms his or her support for the union, the Board will generally disregard the effect which the appearance of his or her signature on a petition might otherwise have had, and will treat his or her last voluntary response to the Board prior to the terminal date as the best evidence of the employee's true wishes. In other words, where there is a properly signed and countersigned membership document which is supported by consideration and a properly completed statutory declaration, as well as a voluntary counter-petition which revokes any intervening statement in opposition to the union's certification, the Board will generally disregard the latter, and treat the membership document and the counter-petition as both sufficient evidence of membership within the meaning of section (1)(1)(l) and sufficient reason why the Board should not exercise its discretion to order a representation vote on the basis of the petition(s).

7. After hearing the evidence and submissions of the parties concerning the aforementioned counter-petitions, the Board made the following unanimous ruling on July 9, 1985:

Although Bimla Rai, one of the two circulators of the counter-petitions, may not have had a full understanding of the potential legal effect of the counter-petitions, having regard to all of the evidence, including the wording of the counter-petitions themselves and the circumstances in which they were signed, we are satisfied on the balance of probabilities that Ms. Rai and the other nine persons who signed the counter-petitions, including the individual who had earlier signed the petition, knew that they were signing a document in support of the applicant union and, in the case of the person who had earlier signed the petition, in opposition to that petition. We are also satisfied that the counter-petitions were voluntarily signed by the persons in question and that they reaffirm their desire that the applicant be certified as their bargaining agent. As indicated by the Board in *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, the Board's experience in these matters suggests that a voluntary petition will generally not be sufficiently probative in the exercise of the Board's discretion under section 7(2) of the *Labour Relations Act* to merit an enquiry into the origination and circulation of a petition in the face of relevant, voluntary counter-petitions such as those before us in the present case. Accordingly, we do not propose to enquire into the voluntariness of the petition, but rather will assume it to be voluntary for the purposes of this case.

8. Following that ruling, counsel for the respondent requested and was given an opportunity to make submissions to the Board with respect to the matter of whether evidence concerning the origination and circulation of the petition should be received, notwithstanding the finding that the counter-petitions were voluntary. It was his position that the Board should nevertheless hear that evidence in the circumstances of this case. Ms. Bonomo, who was the employee who filed the petition with the Board and who served as the objectors' spokesperson at the hearing of this application, initially expressed agreement with the position asserted by respondent's counsel. However, after counsel for the applicant advised the Board and the other parties that the applicant was prepared to agree on the record that the petition was voluntary, Ms. Bonomo advised the Board that she did not see any need to call evidence concerning the petition and no longer wished to call such evidence because the union had agreed that the petition was voluntary. Accordingly, no evidence was heard concerning the origination and circulation of the petition.

9. Counsel for the respondent advised the Board that Rajinder Mangot, the twelfth employee listed on Schedule A of the list of employees filed with the Board by the respondent, left the respondent's premises on June 17, 1985 - two days before the terminal date fixed by the Registrar in respect of this application - and has not returned to work since then. Counsel further advised the Board that it is the respondent's position that Mr. Mangot quit his

employment that day. He also contended that if the applicant had submitted a membership card in respect of Mr. Mangot, the Board should not give any weight to that membership card or certify the applicant without a representation vote on the basis of that membership card. Counsel for the applicant, on the other hand, after noting that Mr. Mangot would clearly be included for purposes of the count as he was an employee on the date of the application, submitted that, in the event that Mr. Mangot had signed a membership card prior to the terminal date, such card should be given full weight.

10. Counsel did not refer us to any case in which the Board has discounted a membership card, or directed that a representation vote be taken, on the ground that the employee left the employ of the employer after the date on which the card was signed, nor has our independent research revealed any such case. The Board has discounted membership evidence signed by an individual on or before the terminal date but *after* that person has been discharged or has quit his or her employment: see, for example, *Hardman Industries Limited*, [1982] OLRB Rep. March 388. However, it appears that the Board has never extended that approach to cover a card signed by an employee before the termination of his or her employment. Indeed, in the analogous context of determining eligibility to vote in a representation vote, the Board has rejected the contention that an employee who has indicated an intention to leave the work place should not be entitled to cast a ballot. In *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. Apr. 461, an employee in the voting constituency gave written notice to her employer on January 21, 1980 that she was terminating her employment at the conclusion of the working day on January 23, 1980. In ruling that the employee in question was eligible to vote in a representation vote held on January 22, 1980, the Board wrote, in part, as follows:

15. Certification is the primary process in *The Labour Relations Act*. It is the means by which the wishes of employees for representation are transformed into the affirmative right of a union to bargain collectively on their behalf with their employer. Generally, apart from exceptional cases involving extreme unfair labour practices, certification is accomplished by an application of majoritarian principles. A union can be certified by demonstrating support in excess of 55% of the bargaining unit through membership cards. It can also be certified by obtaining a simple majority of the ballots cast in a representation vote. These are the two normal routes to certification under the Act. Both of these procedures require the application of percentages to a defined number of employees. Because employees may continuously come and go through hiring, lay-offs, leaves of absence, quitting and discharge, the Board has had to devise some general rules to apply in order to fix a clear and stable figure of employees in a given bargaining unit for the purposes of an application for certification.

16. There are a number of ready illustrations of those rules. The Board has devised, for example, a "terminal date" as a cut off point for assessing the number of membership cards filed by a union and statements in opposition to certification filed by employees. The Board refers to the date that an application is filed for assessing the number of employees in the bargaining unit. (See *R. v. OLRB, Ex parte Hannigan*, [1967] 2 O.R. 469 (C.A.)). And it has developed a "thirty day rule" to determine whether an employee absent on the date of application is to be counted within the bargaining unit for the purposes of the application (*Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840). The Board has also evolved "a seven week rule" as a rule of thumb to assess which employees will be viewed as full-time and which as part-time for the purposes of an application. (*Sydenham District Hospital*, [1967] OLRB Rep. May 135.) These are procedural constructs whose application may mean victory or defeat for either party in any particular application. If all of the lines established by these rules were to be redrawn on a case by case basis the certification process would come to a standstill. These established principles are known to the labour relations community and parties coming before the Board can plan on the basis of them. While none of the above rules are entirely inflexible, there is a substantial onus on any party who seeks to have the Board depart from them in a particular case. (*Trenton Memorial Hospital*, [1980] OLRB Rep. Jan.)

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board's published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Borden Co. Ltd.* (1946), 46 CLLC 16,461) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter's lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

18. In this case the respondent and the objecting employees invite the Board to adopt a different rule. They submit that if an employee has indicated an intention to leave the workplace he or she should not be permitted to influence the outcome of a representation vote. When pressed on the point, however, they are less than clear as to how that principle can be applied in any general way. Is an employee to be deprived of his franchise if, before a representation vote, he indicates an intention to leave his employment within three weeks of the vote? Or three months? Or six months? And is the result of a closely contested vote to be disturbed if an employee who voted is transferred, quits or is discharged within a day or two after the vote? The Board must obviously adhere to a rule that gives some certainty and finality to the granting of bargaining rights and which can be readily understood and applied by the parties.

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20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover....

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard to perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification....

22. The Board has long recognized the right to vote of employees who are transitory, so long as they conform to the minimum requirement of the Board's two-pronged eligibility rule. If they are employed on the date the vote is ordered and continue to be employed to the date the vote is taken, they are entitled to vote. In *J. McLeod & Sons*, [1969] OLRB Rep. Dec. 1100, the Board confirmed the eligibility to vote of a group of employees who fell within the eligibility dates but who in fact had been hired temporarily. They were strikers from a nearby plant who expected to return to their normal employment at some indefinite future date. And in *University of Toronto*, [1974] OLRB Rep. May 267, the Board confirmed the right to vote of all teaching assistants and research assistants employed by the University even though the vote was conducted in May, at the end of the academic year, and a turnover rate of 25 per cent to 35 per cent of the bargaining unit was projected for the next academic year.

23. The selection of a bargaining agent under the Act cannot be conducted on the basis of an ongoing referendum geared to the daily, weekly or monthly changes in the people who make up a bargaining unit. But bargaining rights are not necessarily permanent, and the Act allows for shifts in the wishes of employees whether through the turnover of personnel or otherwise. Any changes in the sentiment of a majority of the employees about union representation over time can be dealt with through the provisions of the Act for the termination of bargaining rights.

11. Similar considerations, including the need for a "bright line" test which provides



guidance and an element of certainty for all of the parties which appear before the Board, have led us to conclude that a membership card signed in an otherwise timely manner by an employee who subsequently quits, or is discharged or laid off, prior to the terminal date should not be rejected by the Board or given less weight than cards signed by other employees. Such an employee is an employee in the bargaining unit at the time the application is made and is also a member of the trade union at the time determined by the Board under section 103(2)(j) for the purposes of calculating the percentage contemplated by section 7 of the Act. Moreover, we are not persuaded that the existence of such circumstance should prompt the Board to direct that a representation vote be taken in the exercise of the Board's discretion under section 7(2) of the Act.

12. In a letter dated July 5, 1985, Cheryl Elliott of counsel for the respondent wrote to the Board as follows:

Further to our letter of today's date, it has come to our attention that one or more of the employees who signed Membership Cards in support of the application, dated May 24, 1985, did not pay a dollar as required by the Board's Rules of Procedure.

The employer alleges that the above constitutes a "no pay", and therefore pursuant to the Board's practice, the employer respectfully requests that a Labour Relations Officer be appointed at the earliest possible convenience to investigate this allegation.

Counsel for the respondent also sent a copy of that letter to counsel for the applicant. In an addendum which (quite properly) was not copied to the applicant, Ms. Elliott named the three persons whom she had been advised had not paid a dollar membership fee.

13. At the July 9, 1985 hearing, counsel for the applicant asked the Board to call upon the respondent to adduce at that time evidence in support of its non-pay allegations. However, the Board declined to depart from its usual practice of having a Board Officer conduct a preliminary investigation into the non-pay allegations. (Under that well established practice, which has been adopted by the Board to protect, insofar as possible, the secrecy of membership evidence, the Board will not generally proceed further with respect to a non-pay allegation if the signed statement which the Board officer obtains from the employee in question confirms the information contained on the signed and witnessed membership card submitted by the applicant in respect of that employee. If the signed statement obtained by the Board officer contradicts the information contained on the membership card, then the Board will summon the employee, the collector, and the Form 9 declarant to a hearing in respect of the non-pay allegation, and will conduct a formal inquiry into the matter by questioning each of those persons, and affording each of the parties an opportunity to question them, adduce other pertinent evidence, and make submissions to the Board.)

14. On September 13, 1985, the Board heard the submissions of the parties concerning the procedure to be adopted in respect of a non-pay allegation which had not been resolved by means of the Board Officer's preliminary investigation. After recessing to consider those submissions, the Board made the following unanimous oral ruling:

We have decided in the circumstances of this case to call the two employees involved in the transaction, the collector, and the Form 9 declarant, as the Board's witnesses. Although Mr. Shell has eliminated the need to subpoena those individuals by arranging to have them present,

we wish to make it clear that they are being ordered to testify by the Board and are not being called to testify by the applicant. We also feel that it is appropriate to draw to the attention of all persons present the provisions of section 80 of the *Labour Relations Act*, which make it illegal for an employer, trade union, or person acting on behalf of an employer or trade union, to discriminate against or in any way penalize a person because he or she has testified or otherwise participated in a proceeding under the Act.

15. Although the testimony given by those witnesses contains some minor discrepancies of the type which often result from the passage of time, we are satisfied that all of the witnesses were sincerely attempting to provide the Board with a full and accurate description of the events as they recalled them. Having carefully reviewed their evidence and the submissions of counsel, we find the material facts to be as follows. On May 6, 1985 the applicant filed an earlier certification application (Board File No. 0294-85-R) in respect of the respondent's employees. After the respondent had raised certain non-pay allegations concerning the membership evidence, the applicant sought leave to withdraw the application upon discovering that it had been misled by a rank and file collector. However, in a decision dated May 24, 1985, the Board, differently constituted, wrote as follows in dismissing that application:

When this application came on for hearing, the applicant informed the Board that it wished to withdraw this application for certification. Having regard to the stage in the proceedings at which the applicant's request was made, the application is dismissed.

16. The applicant filed the present application that same day (May 24, 1985), and proceeded to collect fresh membership evidence. In an attempt to avoid any problems of the type which had been encountered in the previous application as a result of using rank and file employees to collect membership evidence, the applicant arranged for John Harkins to be the collector on all of the membership cards submitted in support of the present application. Mr. Harkins is a full-time organizer employed by the applicant. During the course of his organizational activities on behalf of the applicant, he has served as a collector on hundreds of membership cards.

17. All of the membership cards filed by the applicant in support of the present application were signed in the three-day period from May 26 to May 28, 1985. One of those cards was signed by Jaswinder Manak on May 26 in Mr. Harkins' car. At that time Mr. Manak attempted to give Mr. Harkins eight quarters to cover a \$1.00 initiation fee for himself and a \$1.00 initiation fee for his sister Manjit Krod, who was standing outside the car. In doing so, Mr. Manak explained that his sister did not have any money with her. Mr. Harkins accepted four of the quarters, but returned the other four to Mr. Manak and told him that he could not accept payment from him on behalf of his sister. After signing a membership card, Mr. Manak left the car and handed the remaining four quarters to his sister, on the understanding that she would repay him at home later that day. Ms. Krod then entered the car, paid the four quarters to Mr. Harkins as an initiation fee, and signed a membership card. Although Mr. Harkins did not see Mr. Manak hand the four quarters to Ms. Krod, he assumed that Mr. Manak had done so. After Ms. Krod had signed a membership card and left the vehicle, Mr. Harkins went over to where she was standing with her brother and told them to be sure that the loan was repaid.

18. Mr. Harkins subsequently apprised David Nicholson of those events. Mr. Nicholson,

who was a student-at-law in the employ of the applicant at the time he signed the Form 9 Declaration Concerning Membership Documents (dated June 18, 1985) which has been filed by the Board in support of this application, made no reference to that loan in the Form 9 Declaration, as he was of the opinion that it did not constitute an exception in that Ms. Krod had, in his view, paid a dollar (on account of dues or initiation fees) to Mr. Harkins on her own behalf. Neither Mr. Harkins nor Mr. Nicholson contacted Mr. Manak or Ms. Krod on or before the date the Form 9 Declaration was forwarded to the Board, to confirm that the loan had been repaid. However, we are satisfied on the basis of the testimony of Ms. Krod and Mr. Manak that it had in fact been repaid on May 26, in accordance with their understanding at the time of the loan.

19. In his submissions on behalf of the respondent, Mr. Watson contended that the failure to disclose the transaction in question on the Form 9 Declaration was a serious breach of the Board's practice and procedure. It was his position that the circumstances did constitute an "exception" that should have been disclosed in the Form 9 Declaration. In this regard, it was Mr. Watson's contention that Ms. Krod had not made a payment "on her own behalf". He also urged the Board to look at the present application in the light of the previous application to find a pattern of substantial irregularities. It was his position that the present application should be dismissed with a bar on further applications "for an appropriate period of time", or that, in the alternative, a representation vote should be ordered.

20. Counsel for the applicant submitted that anon-pay had not been established. It was his position that Ms. Krod had paid a one dollar initiation fee to Mr. Harkins on her own behalf, and that the source of that dollar should be of no concern to the collector or to the Board, so long as it did not come from the applicant. Moreover, he noted that the loan had been properly repaid by Ms. Krod to her brother in any event. It was his position that while it might have been more prudent for the applicant to have mentioned this matter in the Form 9 Declaration out of an abundance of caution, there was no obligation to do so as it did not constitute an exception to the information set forth in paragraph 3 of that document. It was also his contention that no pattern of substantial irregularities existed. In this regard, he noted that as soon as the applicant had become aware that it had been misled by a rank and file collector in relation to part of the membership evidence submitted in support of its previous application, the applicant had sought leave to withdraw that application and had filed a new application supported by fresh, untainted membership evidence collected by a full-time organizer employed by the applicant.

21. The Form 9 Declaration filed by the union in support of this application reads as follows:



File No. 0455-85-R

Form 9

LABOUR RELATIONS ACT

DECLARATION CONCERNING MEMBERSHIP DOCUMENTS

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

United Steelworkers of America,

Applicant,

- and -

Laidlaw Wire of Canada Limited,

Respondent,

- and -

Intervener

I, DAVID NICHOLSON, the Student-at-Law of the applicant herein declare that, to the best of my knowledge, information and belief:

1. The documents submitted in support of the application represent documentary evidence of membership on behalf of 10 persons who were employees of the respondent in the bargaining unit that the applicant herein claims to be appropriate for collective bargaining, on the date of the making of the application.
2. There were 17 persons who were employees of the respondent in the bargaining unit that the applicant herein claims to be appropriate for collective bargaining on the date of the making of the application.

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt of an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on the receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

DATED at TORONTO, this 18th day of June, 1985.

“David Nicholson”  
Student-at-Law

22. Section 1(1)(l) of the Act defines “member”, when used in reference to a trade union, to include a person who has applied for membership in a trade union and has paid to the trade union on his own behalf an amount of at least \$1.00 in respect of initiation fees or monthly dues of the trade union. That provision, which was added to the Act in 1970 (as section 1(1)(ga) by *The Labour Relations Amendment Act, 1970*, S.O. 1970, c. 3), codified a well established Board policy. The purpose of the requirement that the person pay at least \$1.00 on his own behalf was described as follows in *R.C.A. Victor Company Ltd.*, 53 CLLC 17,067, at pages 1469-50:

.... it need hardly be pointed out that the Board cannot accept as evidence of payment anything in the nature of a monetary contribution from a person other than an applicant for membership. The money payment constitutes confirmatory evidence of the desire of the payer to become a member of the trade union. If no financial sacrifice is made by the person himself, the only evidence submitted on his behalf is a signature on an application card which the Board has long since held to be inadequate to establish membership. On the other hand, not every loan to a prospective member, especially where the money is repaid, will be fatal to an applicant's case. Thus, in *Sportswear Union and Beauty Form Lingerie Limited* (1951), and *Sportswear Union and Style Rite Blouse Company* (1951), both unreported, there was evidence of a loan being made, in each instance to a single employee. In each of these cases, the Board found on the evidence before it that the applicant had not endeavoured to mislead the Board, and full weight was given to the evidence of membership submitted by the union.

For a number of years, the Board tended to treat such transactions as being tantamount to “non-pays”, particularly where the money was advanced by a trade union official and where the “loans” were not repaid prior to the filing of the membership cards with the Board: see, for example, *Webster Air Equipment Company Ltd.*, 58 CLLC 1810; *Hershey Chocolate of Canada, Limited*, [1963] OLRB Rep May 73; and *Tillsonburg Shoe Co.*, [1964] OLRB Rep. June 142. However, as early as 1958 (in the *Webster Air Equipment* case, *supra*) the Board indicated that it was “not greatly concerned about isolated instances of money being advanced by one employee to another”, in recognition of the fact that such a transaction might well be an incident in an established relationship between two employees where one, knowing and trusting the other, accommodated him by lending him a dollar during a period when he was short of funds. Nevertheless, the Board went on to note in that case that a union acts at its peril in failing to make full disclosure of all material facts where “a loan is made by [a responsible] officer or official [of the union] and the money is not repaid before the hearing, or where there is a pattern of loans having been made, whether by such a person or by rank and file employees, and whether repaid or not”.

23. More recent cases have tended to focus on whether the impugned transaction constituted a *bona fide* loan which the borrower sincerely intended to repay. In *Sandercock Construction Limited*, [1970] OLRB Rep. Apr. 147, the Board discounted membership cards submitted in respect of two employees who had each “borrowed” a \$10.00 initiation fee from another employee without any real intention to repay the “loans”, and had only repaid them “because of further proceedings before the Board”. In *St. Thomas Sanitary Collection Service Limited*, [1972] OLRB Rep. June 600, the Board wrote, in part, as follows:

4. In this case there were certain allegations of non-pay made. The Board accordingly conducted its usual investigation and subsequently a hearing was ordered. The evidence revealed that at the time Clarence Earhart signed an application for membership in the applicant union he did not have a dollar and requested a fellow employee to loan him a dollar and indicated that he would repay the dollar. The collector was another fellow employee. Mr. Earhart intended to repay the money that was loaned to him; however, he stated that when he saw the fellow employee he did not have the money, but when he had the money he did not see him. He further indicated that he felt he was obligated to repay the dollar.

5. It further appeared that the person who signed the form on behalf of the union made the appropriate inquiries of the employee collector and accordingly there is nothing improper about the filing of the Form 8 [now Form 9] in this matter.

6. We are satisfied in the circumstances of this case that a *bona fide* loan was made by one employee to another employee, and we do not find anything improper in the evidence of membership submitted; *Skene Cartage Company Limited* [1966] OLRB Rep. 30.

In *N. A. Construction*, [1982] OLRB Rep. Jan. 77, the Board gave no weight to membership evidence filed on behalf of two employees who, in the presence of the collector, each “borrowed” a dollar from a third employee without any intention of repaying him. In reaching that conclusion, the Board took into account “the fact that the ‘so-called’ loans were made in an informal manner in front of the collector who made no attempt to ascertain whether in fact there was a true intent to repay the money”. (The Board also took into account the fact that the collector actually received the money from the third employee.) In *Shaw Festival Theatre Foundation, Canada*, [1983] OLRB Rep. Sept. 1579, the Board was called upon to determine the membership status of an employee who borrowed \$25.00 from the secretary of the local because the employee did not have enough money to pay the required initiation fee at the time he was approached by that union official and asked to join the local. In finding that employee to be a member of the local for the purposes of the local’s certification application even though the loan had not been repaid as of the date of the hearing, the Board accepted the employee’s testimony that he was obligated to repay the loan and intended to do so. Thus, the Board found the loan to be “a *bona fide* transaction”.

24. Having carefully considered the submissions of the parties in the light of the applicable jurisprudence, the Board has concluded that Manjit Krod was a “member” of the applicant within the meaning of section 1(1)(l) of the Act, at the pertinent time for purposes of this application. Under the circumstances, there can be no doubt that the loan which she received from her brother was a *bona fide* transaction. In this regard, we note that at the time of the transaction, there was a clear understanding between Ms. Krod and her brother that she would repay the dollar to him at home later that day. Having quite properly refused to accept payment from Jaswinder Manak on behalf of his sister, Mr. Harkins, who correctly assumed that the money which Ms. Krod paid to him had been loaned to her by her brother, told Ms. Krod and Mr. Manak to be sure that the loan was repaid. Thus, unlike the collector



in *N. A. Construction, supra*, Mr. Harkins did take steps to assure himself that Ms. Krod intended to repay the loan to her brother. Moreover, the loan was in fact repaid later that day in accordance with the arrangements which had been made at the time of the transaction.

25. As conceded by counsel for the applicant, it would have been prudent to have mentioned in the Form 9 Declaration the loan from Jaswinder Manak to Manjit Krod. Inclusion of that information in the Declaration might have obviated the need for a formal inquiry into the transaction, or at least have enabled the Board to investigate it more quickly. However, Mr. Nicholson's decision to not include that information in the Declaration was, at most, an error in judgment which was not intended to, and did not in fact constitute a fraud or misrepresentation, since, in view of the *bona fide* loan described above, Ms. Krod had in fact paid, on her own behalf, an amount of one dollar to Mr. Harkins in respect of initiation fees. Thus, the transaction did not constitute an exception to the statement contained in paragraph 3 of the Declaration. Nor is there anything in those circumstances, or in any of the other circumstances of this case, which in our view makes it appropriate to direct that a representation vote be taken pursuant to our discretion under section 7(2) of the Act. In this regard, we note that there is no evidence of a pattern of irregularities, as submitted by counsel for the respondent. There was nothing improper about the applicant seeking to withdraw its earlier application upon discovering that it had been misled by a rank and file collector in relation to part of the membership evidence submitted by the applicant in support of that application. In this regard, we note that there is no evidence (or admission) before us of any irregularity in respect of the Form 9 Declaration submitted by the applicant in support of that earlier application, or of any attempt by the applicant to mislead the Board in connection with that application. After that application had been dismissed and a new application filed, the applicant assigned Mr. Harkins to collect fresh membership evidence. As indicated above, no irregularity or attempt to mislead the Board has been established in respect of that fresh membership evidence or the Form 9 Declaration submitted by the applicant in support of the present application. Although there is some indication in the Board's early jurisprudence that irregularities in membership evidence submitted in support of an earlier application may give rise to a "cloud" on fresh membership evidence submitted in support of a new application, which can only be removed by a representation vote (see, for example, *Hydro Electric Commission of Hamilton*, 58 CLLC 18,120), more recent decisions have declined to apply that approach where, as in the present case, there is no evidence that the applicant intended to mislead the Board in the earlier application for certification: see, for example, *Duracon Precast Industries Ltd.*, [1981] OLRB Rep. Jan. 22; *Leco Industries Limited*, [1979] OLRB Rep. May 404; and *The Ontario Hospital Association*, [1979] OLRB Rep. March 243.

26. By letters dated June 21 and July 5, 1985, counsel notified the Board and applicant's counsel of several allegations of intimidation, coercion, and threats, on which the respondent intended to rely in these proceedings. However, at the continuation of hearing of this application on September 27, 1985, the respondent, through its counsel, withdrew all of those allegations and requested the Board to dispose of the application without regard to those allegations. Ms. Bonomo concurred with that withdrawal, and advised the Board that the objectors did not wish to call any evidence.

27. Having regard to all of the evidence and the submissions of the parties, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 19, 1985, the terminal date fixed for this application and the date which the Board determines,

under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

28. For the reasons set forth above, the Board, in the exercise of its discretion under section 7(2) of the Act, declines to direct that a representation vote be taken in respect of this application.

29. A certificate will issue to the applicant.

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**1297-85-R Laurie Fisher & Evalina Van Geutselaar, Applicants, v. London and District Service Workers' Union, Local 220, Respondent**

**Hospital Labour Dispute Arbitration Act - Termination - Termination application filed more than thirty days after conciliation completed - Once conciliation has commenced termination only timely during open period of new collective agreement - Board finding application untimely**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *W. H. Wightman* and *S. O'Flynn*.

**APPEARANCES:** *Evelina Van Geutselaar* for the applicants; *Martin Levinson* and *C. Davidson* for the respondent.

**DECISION OF THE BOARD;** October 16, 1985

1. The name of the respondent is amended to read: London and District Service Workers' Union, Local 220.

2. The applicants are registered nurses employed by Extendicare Health Services Inc. in a 60 bed nursing home in Port Stanley. On July 13, 1984, the respondent trade union was certified as the exclusive bargaining agent for all registered nurses employed in a nursing capacity in that Home. The applicants are the only two registered nurses in that unit. In this application filed August 19, 1985, they ask that the Board terminate the respondent's bargaining rights.

3. The union says it gave notice to bargain pursuant to section 14 of the *Labour Relations Act* on or about July 16, 1984, met with the employer on two occasions in October, applied for conciliation and on December 28, 1984, met with the employer and a conciliation officer who had been appointed on December 7, 1984. The applicants acknowledge that these facts are correct. The union also says that on January 14, 1985, the Minister of Labour issued a notice that the conciliation officer had been unable to effect a collective agreement pursuant to section 3 of the *Hospital Labour Disputes Arbitration Act*, that the union and employer nominees to an interest arbitration board were appointed thereafter, that the agreed-upon chairman of that Board resigned on June 19, 1984, the parties were unable thereafter to agree

upon a new chairperson, and on September 23, 1985, the Minister of Labour appointed a person to sit as chairman of the board of arbitration. Until these facts were revealed to them in the union's reply to this application, the applicants say they were unaware of them; indeed, they say the union's failure to keep them informed is one of the reasons they filed this application. The applicants do not dispute these additional facts, however, and certainly do not dispute that this process has not yet resulted in a collective agreement governing the terms and conditions of their employment.

4. The applicants' representative acknowledges that they are employed in a nursing home. A nursing home is a "hospital" to which the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c.205 applies. Section 12(1) of that Act provides:

Notwithstanding section 61 of the *Labour Relations Act*, where a trade union that has been certified as bargaining agent for a bargaining unit of employees of a hospital has given to the employer of such employee notice under section 14 of that Act and the Minister has appointed a conciliation officer, an application for a declaration that the trade union no longer represents the employees in the bargaining unit determined in the certificate may be made only in accordance with subsection 57(2) of the *Labour Relations Act*.

Subsection 57(2) of the *Labour Relations Act* provides:

Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

5. But for the provisions of the *Hospital Labour Disputes Arbitration Act*, a termination application would be timely where, as here, a collective agreement has not been made within one year of certification and more than thirty days have elapsed after the conciliation process has run its course. When that Act applies, however, the combined effect of the above-quoted statutory provisions is that once a conciliation officer has been appointed, an application for termination of bargaining rights may not be brought until after the interest arbitration process contemplated by the *Hospital Labour Disputes Arbitration Act* has resulted (as it must, eventually) in a collective agreement, and then only during the time periods specified in subsection 57(2) of the *Labour Relations Act*: *Birchcliff Nursing Home*, [1975] OLRB Rep. April 384; *Salvation Army Grace Hospital*, [1978] OLRB Rep. Dec. 1142; *Nel Gor Castle Nursing Home*, [1979] OLRB Rep. Oct. 1013; *Bobier Convalescent Home*, [1983] OLRB Rep. June 863.



6. This application is untimely because it was filed after the appointment of a conciliator officer and before the commencement of the "open period" of a new collective agreement. In these circumstances, we are obliged to and do hereby dismiss this application.

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**1477-84-R Ontario Nurses' Association, Applicant, v. Ontario Cancer Treatment and Research Foundation, Respondent, v. The Canadian Union of Public Employees, Intervener, v. Group of Employees, Objectors**

**Employer - Agency providing research services to organization engaged in national research project - Organization providing or channeling funding - Whether part-time "nurse examiners" retained by agency employees of agency or organization**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *B. L. Armstrong* and *D. M. Blair*.

**DECISION OF THE BOARD;** October 16, 1985

# I

1. This is an application for certification. In a decision dated October 31, 1984, the Board recorded the parties' agreement to a bargaining unit framed as follows:

All registered and graduate nurses employed in a nursing capacity by the respondent, at Ottawa, Ontario, save and except head nurse (general division) and nurse administrator, employees above the rank of head nurse (general division) and nurse administrator, and employees covered by subsisting collective agreements.

However, the parties were not in agreement about the precise composition of this agreed bargaining unit and, in particular, whether it included four part-time "nurse examiners" working in the respondent's Ottawa clinics. The respondent asserted that these nurses were employees of the National Cancer Institute of Canada ("NCIC"). The applicant contended that they were employees of the respondent (hereinafter referred to as "OCF").

2. On the basis of the documentary evidence of membership before it, the Board determined that the applicant was entitled to have its right to represent the respondent's nurses determined by a representation vote, whether or not the nurse examiners were included in the bargaining unit. The Board directed that such vote be taken, with the proviso that the ballots of the four disputed individuals would be segregated pending a resolution of the question concerning the identity of their employer. To this end, a Board Officer was appointed to inquire into that matter and make a report to the Board.

3. The representation vote was conducted on November 5, 1984. In a decision of the Board dated November 20, 1984, the results of the representation vote were reviewed, and the Board determined that the applicant had demonstrated sufficient employee support to warrant interim certification regardless of the disposition of the segregated ballots. The Board noted that a final certificate would have to await a determination of the status of the four nurse examiners.

4. On January 3, 1985, the Board Officer convened a meeting of the parties. At the meeting, the parties agreed that the evidence of Ms. Brenda Doyle, one of the nurse examiners, would be representative of all four disputed persons. Ms. Doyle's testimony was supplemented by that of Dr. Gordon Catton, the director of the respondent's Ottawa Regional Cancer Centre. In addition, the respondent filed (without objection) a number of letters which, it was said, would help clarify the relationship between OCF and NCIC. Following the release of the Officer's report recording the oral and documentary evidence to be put before the Board, both parties had the opportunity to make written submissions respecting the conclusion which, in their view, the Board should reach on the basis of the material before it. Accordingly, the issue that the Board must now determine is the identity of the "employer" of the nurse examiners and, thus, whether they are included in the bargaining unit which the applicant is entitled to represent.

5. We have not found this an easy task, for the evidence is both ambiguous and, in many respects, incomplete. There are plausible arguments in support of both parties' positions. The difficulty arises, at least in part, because neither of the possible "employers" is a commercial enterprise, nor is their relationship structured on a commercial basis. They are related "non-profit" organizations, dependent upon external funding, and in pursuit of their common (and laudable) objectives, they have paid much more attention to how to accomplish what they both regard as a desirable research project than to which of them will be the "employer" of the subject employees with the concomitant "employer" rights and obligations. Indeed, when the testimony is viewed as a whole, and, in light of such historical perspective as the evidence allows, it is evident that the study in Ottawa is something of a "joint venture". To a degree, the four nurses are under common (or joint) control or direction by both OCF and NCIC.

6. In *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, the Board set out seven *indicia* which can assist in the determination of who is the "actual employer" in a given set of circumstances. The Board noted that an entity is more likely to be characterized as "the employer" when it is:

1. The party exercising direction and control over employees performing work;
2. The party bearing the burden of remuneration;
3. The party imposing discipline;
4. The party hiring the employees;
5. The party with the authority to dismiss;

6. The party perceived to be the employer by the employees; and
7. Whether there exists a subjective and mutual intention to create the relationship of employer-employee.

However, the relative weight to be attached to each particular factor may vary with the business and collective bargaining context. In *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538, the Board observed:

The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

7. Most of the factors enumerated in *York Condominium* are evidentiary *indicia* of “control”, and are based upon the common-law notion that “control” is a key element in identifying a master-servant relationship. Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, and the time and place where it shall be done. Control is reinforced by an employer’s authority to hire, fire, direct the work force, grant or withhold economic rewards, and so on. However, where the evidence is equivocal and the lines of authority are blurred, it may also be useful to take a broader perspective and consider whether the disputed individuals are predominantly part of one business organization as opposed to another. With what organization are their activities most closely integrated? [We might also note, parenthetically, that ambiguity in identifying the employer for collective bargaining purposes was one of the labour relations problems which section 1(4) of the Act was designed to avoid. (See *Sutton Place Hotel*, *supra*, at paragraph 25.)

## II

8. The NCIC has its offices in Toronto and is currently engaged in co-ordinating a national breast screening study (“study”) at various facilities across Canada. Plans for such a study have been under consideration for some years. As early as December, 1978, Dr. A. B. Miller of the NCIC wrote to the then Ontario Minister of Health to outline the value and objectives of such a study and to request government support.

9. Drs. Catton and Meakin of the OCF also had some involvement in assessing the feasibility of Dr. Miller’s proposal. In December, 1979, Dr. Meakin indicated that the OCF was prepared to make certain of its facilities available for the study but, at the time, could not endorse it completely “because of grave concerns about the feasibility and some concerns about the science of the proposal”. These concerns must have been overcome, because later letters indicate a continuing dialogue about how the project should be organized and staffed.

10. It is interesting to note that very early on it was envisaged that OCF staff or



consultants would take part, and that certain sums would be set aside to “recompense the individual department or practice for the time spent on the study”. For example, one letter dated February 7, 1983, suggests that a radiology technician should be selected by the head of the department of radiology in each participating institution [here OCF] and seconded to the study. The same letter suggests that Dr. Catton of OCF should determine the required “mix” of clerical or administrative support staff - in particular, the advisability of hiring a full-time co-ordinator who would also perform some clerical functions, and reducing the secretarial complement accordingly.

11. Apparently, in August, 1982, there was pressure from a number of local women to establish a study centre in Ottawa. In response, Dr. Catton of OCF investigated the available facilities and decided that the study could best be accommodated at OCF’s own facilities. With a grant from the Ottawa designated funds of the Cancer Society, OCF purchased some new equipment and undertook structural modifications at both of its clinics. These alterations were designed so that both areas could be restored to their original form at the end of the study. The study is scheduled to run for a five-year period with NCIC having the option to terminate it earlier should NCIC so decide. It is not clear what might prompt NCIC to exercise this option.

12. Funding for the study is derived from grants obtained from sources independent of OCF - although, as noted, certain funding for equipment and renovations was obtained by OCF from its own funding sources. We do not know what proportion of the actual cost of the Ottawa study centre can be attributed to OCF and its funding sources, or to NCIC and its funding sources, or whether some of the sources are the same. The evidence suggests that NCIC is a conduit for funds from federal agencies such as Health and Welfare Canada. We do know that in Ottawa, the premises, equipment and administrative facilities are all provided and managed by OCF. The NCIC office in Toronto does not, and probably could not, direct the day-to-day operations in Ottawa. Dr. Catton has a dual role (as he put it, he “wears two hats”). He is employed by OCF as its Ottawa regional director and, in addition, acts on a voluntary basis as director and administrator of the study in Ottawa. He testified that in this latter capacity he is acting on behalf of NCIC rather than OCF, and he clearly does have a liaison role and performs administrative functions in respect of the NCIC study in Ottawa. It is less clear that he is acting solely on behalf of NCIC. He is also supervising the use of OCF facilities being employed to accomplish an objective in which OCF has an interest. Dr. Catton testified that he reports on his activities to his own (OCF’s) board of directors. This is hardly surprising, given that OCF donates physical premises, equipment, heat, electricity, administrative and managerial skills, and business office time.

13. Before the formal establishment of the Ottawa study centres, there were discussions about the number, kind, and training of employees required to meet the objectives of the research project. Dr. Miller and a Ms. Turnbull, of NCIC participated in these discussions, as did Dr. Catton and Ms. MacMillan, the respondent’s administrator of nursing. It was determined that the study would require three or four part-time nurse examiners, some associated clerical support staff, and a full-time co-ordinator. Advertising for the nurse examiners was undertaken by OCF under its own name. Ms. Doyle contacted Dr. Catton and subsequently arranged an interview with Dr. Catton’s secretary. Ms. Doyle was interviewed by a panel of five individuals, including Dr. Catton and Ms. MacMillan and two surgeons associated with the study. The evidence does not disclose the precise involvement of the surgeons, their relationship with NCIC or OCF or both, or the identity of the fifth interviewer.

Ms. Doyle was advised of the terms and conditions of employment and told that the study was expected to last for five years. She was informed that Ms. Judy Snider, the study co-ordinator, would be her immediate supervisor. Ms. Doyle recalls that she was informed by Ms. Snider of the success of her application for employment, although she may also have received a letter from Dr. Catton himself.

14. It is not clear why Ms. MacMillan was involved in this employee selection process, since, it was said, she has no direct involvement in the study. Dr. Catton suggested that as nurse administrator at OCF, Ms. MacMillan has to "supervise everything that is going on that affects the clinic nurses and the function of the clinic, the same as I do...[she must conduct] a cursory overview that everyone is behaving themselves". In the approximately eighteen months since the Ottawa Centre's inception, Ms. MacMillan has never been required to exert any managerial authority in respect of the nurse examiners. But that, in itself, is not surprising. Given the professional status and part-time hours of the nurse examiners, one would not anticipate that the kind of overt exercise of managerial authority which might be found in other contexts - particularly where, as here, the four part-time nurse examiners report immediately to Ms. Snider, and through her to Dr. Catton himself.

15. Dr. Catton holds himself out as having the authority to discharge the nurse examiners. In a memo dated December 13, 1984, they were advised that it was both "study" and OCF clinic policy that they could not recommend physicians either to participants in the study or outside of this setting. The nurse examiners were warned that if they did not abide by this policy, they would be dismissed. Dr. Catton also acknowledged that the nurse examiners could come to him if there were problems in the clinic. In one instance difficulties arose over the fact that only three nurse examiners had been hired, which created problems for the domestic arrangements of the employees. The nurse examiners initially raised this problem with Ms. Snider, their immediate supervisor, who, in turn, directed them to Dr. Catton. Dr. Catton resolved the problem by arranging for the hiring of a fourth nurse examiner.

16. OCF acts as paymaster. The nurse examiners receive cheques bearing OCF's name. OCF lists itself as "the employer", for taxation purposes, on the employees' T4 reporting forms. OCF makes the required tax, unemployment insurance, and pension deductions. OCF provides the nurse examiners with malpractice insurance coverage, even though their job description suggests that this is their own responsibility. However, their rates of wages are not the same as OCF's regular employees, nor is there any sharing of duties or interchange of functions. The nurse examiners work in a separate area, but share the same staff room as the OCF employees. According to Dr. Catton, the employees' wages are substantially determined by a budget which he established in conjunction with Dr. Miller of NCIC. His discretion to determine salaries is limited by that budget. The budget itself was not produced or explained, so we do not know its components, limits, sources, origins, or relationship to the OCF budget or budget-making process.

17. Ms. Snider did not give evidence, but it is apparent that she is the immediate supervisor of the nurse examiners. As her job title suggests, she co-ordinates their activities and those of the women participants in the study. She oversees the collection of data and ensures that the nurse examiners' tasks are being performed in accordance with the NCIC research guidelines. Training of the nurse examiners was undertaken by Ms. Snider in conjunction with study personnel, presumably designated by NCIC. Ms. Snider has periodic

meetings with NCIC officials in Toronto. The evidence does not disclose the frequency, or participants in those meetings, or their precise purpose. There is no evidence that they have anything to do with the employment relationships of the employees working on the study in Ottawa.

18. Ms. Snider herself reports to Dr. Catton. She was hired by Dr. Catton and served a three-month probationary period. Her terms and conditions of employment are the same as the full-time employees of OCF. In short, her situation is as ambiguous as that of the nurse examiners, and there are strong indications that she too is an employee of OCF.

19. Just as Ms. Snider has occasion to visit the NCIC offices in Toronto, NCIC officials sometimes visit Ottawa. This was particularly so in the early months when the study was getting underway, but thereafter the frequency declined. On one occasion Ms. Turnbull of the NCIC had occasion to discuss the wages paid to the nurse examiners. Ms. Doyle indicated that the question was raised because she thought that Ms. Turnbull would be able to explain the rationale for their rates of pay because of Ms. Turnbull's familiarity with general study administration. However, it appears that, on this occasion, the purpose of Ms. Turnbull's visit was to ensure that the study information was being properly collected. It had nothing to do with employer-employee concerns. There is very little evidence that NCIC has shouldered the burdens of, or has represented itself to be the nurse examiners' employer, except to the extent that their wages may come from funds administered by NCIC.

20. The forms and letters utilized for study purposes refer only to the national breast screening study. There is no explicit reference to the Ontario Cancer Treatment and Research Foundation, although, of course, study participants come to OCF's Ottawa clinics for examination. The nurse examiners themselves were not very clear about who their employer was. They knew they worked on the study which was sponsored by NCIC, but they also regarded themselves as being part of OCF because the Ottawa component of the study was being undertaken in OCF facilities, under the direction of Dr. Catton, the OCF director.

### III

21. The problem posed by the evidence in this case is primarily one of characterization. Is OCF providing facilities, equipment, expertise, managerial skills, administrative assistance, and the services of some of *OCF's* employees so that NCIC can accomplish its research objectives in Ottawa with *four of NCIC's own employees* working within an organizational framework provided by OCF? Or should one view the situation as an effort by OCF to expand its *own organization*, including its *own employee complement*, in order to participate in a national research project in which OCF is interested, which OCF has helped to initiate in the Ottawa area, but which is co-ordinated by NCIC and funded, at least in part, by NCIC's funding sources? We are inclined to this latter view which, in our opinion, is most consistent with the totality of the evidence; moreover, the situation here is not as unique as might first be supposed. In our modern society, information (scientific or commercial) is a valuable commodity for which customers are prepared to pay. It is not at all unusual for a business or government organization to commission research which, in turn, requires careful specification of the data required and continuing liaison with the co-ordinating or recipient agency to ensure that its needs are properly met. The fact that a university, research



organization, or "think tank" chooses to involve itself in a research project, and to this end, engages several individuals on a part-time basis to gather information, does not, in itself, make those individuals "employees" of the ultimate recipient of the information or its funding agency. The difficulty with the respondent's position is that it relies almost entirely on Dr. Catton's personal opinion that while he works for and is paid by OCF, in hiring the employees, changing the employee mix, arranging for a new employee to be hired in response to employee concerns, determining their salary (albeit within limits specified by the budget), threatening to discharge them if they contravened "study" and OCF policy, exercising (with Ms. MacMillan) ultimate residual authority, paying employees on OCF cheques, providing them with malpractice insurance paid by OCF, and specifying OCF as "the employer" on the employees' tax documents, he and OCF were acting only as unpaid agents for NCIC.

22. We do not accept that proposition. While NCIC may provide or be a conduit for funds for the study, it is not their employer. Having carefully considered the evidence, and noting its deficiencies, we find that the disputed nurses are employees of OCF and are, therefore, properly included in the applicant's bargaining unit.

23. A final certificate will now issue to the applicant in respect of the bargaining unit set out in paragraph 1 hereof.

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**0758-85-R** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC), Applicant, v. 574037 Ontario Ltd. (c.o.b. **O'Tooles Road House Restaurant**), Respondent, v. Group of Employees, Objectors

**Membership Evidence - Practice and Procedure - Receipt signed before dollar collected - Misinformation by collector causing inaccurate Form 9 declaration - Board considering effect on membership evidence - Only tainted card rejected in circumstances**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *J. A. Ronson* and *L. C. Collins*.

**APPEARANCES:** *Linda Rothstein*, *William Whyte* and *Tom Rees Jr.* for the applicant; *S. A. Bernofsky*, *Dan O'Toole* and *Michael Matron* for the respondent; *Paul Cridland*, *Doug Anderson* and *Allan Gray* for the objectors.

**DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN, AND BOARD MEMBER L. C. COLLINS; October 7, 1985**

1. At the continuation of the hearing into this application for certification, the Board ruled that it would receive evidence and argument relevant to the allegation that the applicant had filed membership evidence indicating that one dollar had been paid to the applicant by persons who had applied to join the applicant when in fact those persons had not paid one

dollar to the applicant. That allegation, if substantiated, and depending on the circumstances, may well affect the integrity and reliability of all of the membership evidence filed by the applicant in support of this application.

2. The Board, upon receiving the specific allegations of “non-pay”, followed its normal practice and conducted an investigation into the allegations. As a result of that investigation, it summonsed four persons, 3 employees of the respondent who had signed membership cards and the union official who had signed the Declaration Concerning Membership Documents (Form 9). Paul Cridland, an employee of the respondent and a person who allegedly did not pay one dollar to the applicant was also the collector of the membership card signed by Allan Gray, another employee of the respondent. Thomas Rees Jr., the union official who signed the Declaration Concerning Membership Documents, was also the collector of the membership cards signed by Doug Anderson and Mr. Cridland.

3. Mr. Anderson testified that when Mr. Rees obtained his signature on his membership card, he also gave Mr. Rees one dollar. Mr. Rees also told Mr. Anderson that everyone had paid one dollar.

4. Mr. Gray testified that Mr. Cridland approached him about joining the union. After some discussions about it, Mr. Gray signed the union membership card. Mr. Gray did not give Mr. Cridland one dollar. Mr. Gray testified that Mr. Cridland told him that everybody had to pay one dollar, but not to worry about it because he would get it later.

5. Mr. Cridland testified that Mr. Rees first approached him about the union while Mr. Cridland was working at the respondent's restaurant. Mr. Cridland and Mr. Rees also spoke several times on the telephone. Mr. Rees later went to Mr. Cridland's home. At the meeting at Mr. Cridland's home, they discussed the union and the union's organizing campaign. At that time, Mr. Cridland was quite interested in the union and Mr. Rees mentioned to Mr. Cridland that there might be a job with the union organizing in other restaurants. Mr. Cridland signed a union card in Mr. Rees' presence. Mr. Rees asked Mr. Cridland for one dollar, but Mr. Cridland did not have it. Mr. Rees told Mr. Cridland that he would get it from him later. Mr. Rees signed the acknowledgement of receipt of one dollar portion of the card and Mr. Cridland signed the confirmation of payment portion of the card at that time although no money was given to Mr. Rees by Mr. Cridland. Later that same day, Mr. Cridland obtained the card from Mr. Gray, but did not collect one dollar from Mr. Gray. A few days later Mr. Cridland also obtained signed membership cards from two other employees, but did not collect any money from them.

6. Mr. Rees testified that when Mr. Cridland signed a membership card, he asked Mr. Cridland for one dollar. Mr. Cridland looked for some money, but could not find any. Mr. Rees admitted signing the acknowledgement of receipt portion of the membership card at Mr. Cridland's home before collecting any money from Mr. Cridland. Mr. Rees told Mr. Cridland the importance of collecting the dollar and the procedure to be used when signing cards. Mr. Cridland and Mr. Rees agreed to meet at Mr. Rees' home that evening. Mr. Rees told Mr. Cridland that he would get the money from him at that time.

7. Mr. Rees and Mr. Cridland both testified that Mr. Cridland went to Mr. Rees' home and that William Whyte, the business manager of the applicant was there. Mr. Cridland testified that when he arrived, Mr. Rees and Mr. Whyte asked “how it went”, in reference

to getting Mr. Gray signed up. Mr. Cridland testified that he had no money with him and simply gave Mr. Rees the card that Mr. Gray had signed. He also testified that Mr. Rees did not ask him for any money.

8. Mr. Rees and Mr. Whyte both testified that when Mr. Cridland arrived, he gave Mr. Gray's membership card to Mr. Rees together with one dollar. Mr. Rees asked about Mr. Gray's membership card and asked whether Mr. Gray had paid one dollar to Mr. Cridland. Mr. Rees then said to Mr. Cridland that he had to collect one dollar from him. Mr. Cridland took a five dollar bill from his wallet. Neither Mr. Rees nor Mr. Whyte had change on them. They went into the house, and Mr. Whyte, who came out first, gave Mr. Cridland \$4.00 change. Mr. Cridland stayed with Mr. Rees and Mr. Whyte about 20 minutes and then left.

9. It is clear to the Board that Mr. Gray did not pay one dollar to the applicant and therefore his membership card cannot be relied on as evidence of membership in this proceeding. Mr. Gray's card is the only card that shows Mr. Cridland as a collector. The other two cards that Mr. Cridland collected and delivered to Mr. Rees at a time after Mr. Cridland's meeting at Mr. Rees' home were not filed with the Board. Mr. Rees remembered receiving those cards that Mr. Cridland had obtained, but no money was with them and the cards had not been filled out properly. One of the two employees who signed the cards Mr. Cridland collected had left the respondent's employment. Mr. Rees collected a new card and one dollar from the other employee.

10. Mr. Rees was the collector of all of the remaining cards but one. The collector of that card was another employee of the respondent who had obtained it early in the organizing campaign. Mr. Rees testified that when that card and one dollar had been received from that collector, he questioned the collector as to whether the employee had signed the card and had paid one dollar.

11. The sole factual issue before us at this point in this proceeding is whether Mr. Cridland paid one dollar to Mr. Rees when Mr. Cridland went to Mr. Rees' home that evening. In order to determine that factual issue, we must decide whether we accept Mr. Cridland's evidence over the evidence of Mr. Rees and Mr. Whyte. We are satisfied that both Mr. Gray and Mr. Anderson were credible witnesses whose testimony did not conflict with any of the other evidence we received and their testimony can be used by us in assessing the evidence of Messrs. Cridland, Rees and Whyte.

12. Mr. Cridland testified that Mr. Rees, when telling him about signing up employees, did not make very much of collecting one dollar from employees. Mr. Cridland said that he did not think collecting a dollar from employees who signed membership cards was too significant at that time. However, Mr. Gray was quite specific in recalling that Mr. Cridland told him that everyone had to pay one dollar. Under cross-examination, Mr. Cridland, when asked about the conversation with Mr. Gray, thought that Mr. Gray had mentioned it first, then was not sure who mentioned the dollar first, and then conceded that he might have told Mr. Gray that he would cover Mr. Gray's dollar payment to the union. Mr. Cridland also said that Mr. Rees did not stress the dollar payment, yet agreed further in cross-examination that he had told Mr. Gray that everyone had to pay one dollar and that he would get it later.

13. Mr. Cridland, when asked by the applicant's counsel in cross-examination about when he realized the dollar payment was important, also gave inconsistent answers. He initially



said that he first knew about its importance when he came to the Board for the first hearing of this matter in July, yet when confronted with his own evidence that he had talked to other employees about whether they had paid money to the union well before that hearing, said that he thought of it on his own. Mr. Cridland did not deny counsel's suggestion that when he was at Mr. Rees' home with Mr. Whyte, Mr. Whyte had told him about the importance of the dollar payment.

14. Mr. Whyte testified that he advised Mr. Cridland about the importance of the dollar payment and what effect a "non-pay" could have on the applicant's organizing campaign. Mr. Cridland did not recall that conversation. Mr. Whyte also testified that Mr. Cridland and Mr. Rees spoke about Mr. Cridland getting a job with the union as an organizer.

15. Having heard the evidence and observed the demeanor of the witnesses, we are satisfied that we should accept the evidence of Mr. Rees and Mr. Whyte where it conflicts with Mr. Cridland's evidence. Mr. Cridland was quite sure that Mr. Rees had not stressed the importance of collecting the dollar payment from employees, yet the same afternoon that he had met Mr. Rees, Mr. Gray was told by Mr. Cridland that everyone had to pay one dollar and further that Mr. Cridland would cover Mr. Gray's payment for him. We find that Mr. Cridland was interested in securing Mr. Gray's name to a membership card and was reluctant to ask Mr. Gray for one dollar, lest Mr. Gray refuse. Mr. Cridland's comment in testifying about his conversation with Mr. Whyte and Mr. Rees is most illuminating in this regard. Mr. Cridland, in explaining why Mr. Rees did not ask him for one dollar said that in his opinion, it would not be good practice to bring money up when trying to sign people up.

16. Mr. Cridland, who was quite interested in the union at the time, wanted to sign other employees into the union. We are satisfied that he knew that one dollar had to be collected but that he did not want to do so because he thought it would make it more difficult to get employees to join the union.

17. We are therefore satisfied that when Mr. Cridland arrived at Mr. Rees' home he advised Mr. Rees that Mr. Gray had paid one dollar to the union. We are also satisfied that Mr. Rees asked Mr. Cridland for a dollar for his own card, as he said he would do earlier that afternoon, and that Mr. Cridland paid it out of a five dollar bill he had in his wallet.

18. We are reinforced in this view by the evidence of both Mr. Whyte and Mr. Rees who gave their evidence in a straightforward fashion. Mr. Rees was quite candid in saying that he had made a mistake by signing the acknowledgement of receipt portion of Mr. Cridland's card without having first received a dollar from him. However, he said that he expected to get the dollar from Mr. Cridland that evening. Mr. Whyte was also quite candid in his evidence. Indeed, in response to a question from Board Member Ronson, he indicated that he saw no problem with what Mr. Rees had done in respect of Mr. Cridland's card as long as the money was collected.

19. The Board has indicated on numerous occasions that unions must meet a high standard in collecting membership cards and submitting membership evidence to the Board. While we are very concerned by both Mr. Rees' willingness to sign an acknowledgement of payment without first receiving money from the employee who signed a membership card in the union, and Mr. Whyte's apparent lack of concern over the process so long as the money is collected, we are satisfied that in this case, Mr. Rees collected a dollar from Mr. Cridland

and further made the proper inquiries of both of the collectors. Nevertheless, if Mr. Rees had precisely followed the correct procedure, that is, not acknowledging receipt of money before the money was paid, and if Mr. Whyte had been more concerned about union officials following the correct procedure, the applicant may not have faced the problem that we dealt with here.

20. Our factual determination must lead to a finding that the Declaration Concerning Membership Documents (Form 9) that was filed by the applicant is not accurate. However, we are satisfied that its inaccuracy is attributable to the misinformation conveyed to Mr. Rees from Mr. Cridland. Because Mr. Rees collected almost all of the cards submitted, he relied on personal knowledge and the inquiry he had made of the other collector in making the declaration. Therefore, in all of the circumstances, the Board is satisfied that all of the membership documents except the one filed on behalf of Mr. Gray can be relied on by the Board as evidence of membership in the applicant.

21. This matter is hereby relisted for continuation of hearing before this panel of the Board on October 18, November 1, November 12 and November 22, 1985.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I make no effort to prefer the evidence of any of the witnesses to the issue before us. The evidence is a mess of contradictory self-interest combined with vagueness whenever the going got tough.

2. In the normal course the complaint would be dismissed because there was no proof on the balance of probabilities. But this is an inquiry *by the Board* into the reliance that can be placed on *hearsay evidence*. And one fact is clear; membership cards were collected and no dollars were paid.

3. The evidence of all the witnesses was so unsatisfactory that I do not feel that the membership evidence should be accepted on its face. Nor should it be disregarded. I would exercise our discretion under the Act and order a vote.

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**1465-85-R; 1466-85-R; 1467-85-U** United Steelworkers of America, Applicant/Complainant, **Plaza Fiberglas Manufacturing Limited** and Plaza Electro-Plating Limited, Respondents

Practice and Procedure - Witness - Employer refusing to post notices of Board proceedings - Whether Board notice defective - Whether Board officers having authority to forcibly enter employer premises to effect posting - Whether Board officers or other staff competent or compellable witnesses - Whether conduct of Board staff causing Board to lose jurisdiction

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *F. C. Burnet* and *W. F. Rutherford*.

**APPEARANCES:** *Brian Shell* and *Brando Paris* for the applicant/complainant; *J. C. Murray* and *Peter Hatch* for the respondents.

#### **DECISION OF THE BOARD;** October 22, 1985

1. These three matters are: an application for certification as exclusive bargaining agent for a bargaining unit consisting of all employees of the respondents in the Municipality of Metropolitan Toronto, with certain exceptions, an application under subsection 1(4) of the *Labour Relations Act* for a declaration that the respondents be treated as one employer for the purposes of the Act, and a complaint under section 89 of the Act alleging that members of the managements of the respondents reacted to the applicant/complainant's organizing campaign by interrogating and intimidating employees about union activities, engaging in surveillance of the site of a union meeting to which their employees had been invited and terminating a number of employees because of their suspected involvement in union activity.

2. When these matters came on for hearing before this panel on October 4, 1985, counsel for the respondents made several preliminary objections to our hearing them. Most of the objections focused on the way in which notice of these proceedings was given to the respondents' employees. We heard evidence and argument with respect to those objections on October 4 and October 10, 1985. We then reserved and now deliver our decision on the submissions made during those days of hearing.

3. When filed, the applications and complaint named three respondents: Plaza Fiberglas Manufacturing Limited ("Plaza Fiberglas"), Plaza Electro-Plating Limited ("Plaza Electro-Plating") and Citron Automotive Ltd. ("Citron"). Counsel for the trade union advised us, and it is apparent from reading the trade union's initial filings, that it was seeking to organize employees who worked in operations carried on at 4420 and 4440 Chesswood Drive, and nearby 70 Vanley Crescent, in Downsview, but was unsure which employees were employed by which of the corporate respondents. Joe Chelminsky is General Manager of both Plaza Fiberglas and Plaza Electro-Plating. He gave evidence for the respondents in connection with their preliminary objections. He testified that he is responsible for overlooking certain of the activities of Citron, and confirmed the representation of counsel for the respondents that Citron had no employees at any of the municipal addresses in question. Having heard that evidence, counsel for the applicant advised the Board that it would not pursue its applications and complaint against the respondent Citron. The titles of these proceedings have been amended accordingly.



4. The respondents' main preliminary objection is that this Board and every potential quorum of it has lost jurisdiction to entertain these applications because of actions of the Board's support staff in connection with the posting on the respondents' premises of notices to their employees of these proceedings. In particular, the respondents say that when they refused to comply with a direction to post such notices, the Board had no authority to enter their premises forcibly with the assistance of police or sheriff's officers to effect posting. Counsel for the respondents said he was prepared to lead evidence to establish that the Registrar and other Board officers threatened to and ultimately did enlist the assistance of police and sheriff's officers, and that a Board officer eventually used force to enter the respondents' premises and post notices in the company of a sheriff's officer who threatened to arrest anyone who interfered. There was no suggestion that the force used was in excess of that required to enter and post notices. Counsel's argument was that the Board had no jurisdiction to use any force at all, and its officers' having done so gave rise to a reasonable apprehension of bias because the Board was thereby made to appear the ally of the trade union. Counsel sought the applicant/complainant's agreement to these facts, but the applicant/complainant put the respondents to the strict proof of their allegations.

5. Before leading evidence, counsel for the respondents asked that this panel of the Board issue subpoenas directed to the Registrar, the Board Solicitor and the Board officers who had attended at the respondents' premises and, further, give its consent under section 109 of the *Labour Relations Act* to the giving of testimony by those persons in the proceedings before it. Counsel explained that he wished the Registrar's testimony to establish what took place in a telephone conversation he had with the respondents' General Manager, Mr. Chelminsky, on September 20th, the Board Solicitor's testimony to establish what took place in a telephone conversation he had with the respondents' solicitor on September 23rd and the testimony of the Board officers to establish what took place in their dealings with others during their attendances at the respondents' premises on September 20, 23 and 26, 1985. After considering the parties' submissions, we ruled orally that we would not consider compelling or consenting to the testimony of any Board officer or employee until after the respondents had led evidence of their own witnesses with respect to the matters about which testimony of Board officers and employees would be sought. Counsel for the respondent then called three witnesses and, at the conclusion of their evidence, declined the opportunity to renew his request with respect to the testimony of the Registrar, Board Solicitor and Board officers. Counsel for the trade union called no witnesses. Accordingly, the testimony of the respondents' three witnesses is the only evidence before us with respect to the behaviour complained of by the respondents. Before turning to that evidence and the preliminary issues themselves, it might be helpful to give a brief explanation of our ruling on the request to compel testimony of Board officers.

6. Section 109 of the *Labour Relations Act* provides:

109. Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil suit or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

Although officers of the Board are regularly involved in settlement discussions, section 109 goes beyond merely protecting settlement discussions from disclosure; it is designed to ensure

that participants in the settlement process are confident that the principle that disclosure of their conversations with the Board officers cannot be compelled is not hedged about with technical exceptions and legal definitions: see, *Seven-Up Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87 at paragraphs 12 to 17. Indeed, prohibition against disclosure imposed by section 109 extends beyond information which might be obtained in settlement discussions to information of any kind whatsoever which anyone connected with the Board might obtain in the discharge of his or her duties or while acting within the scope of his or her employment. One of the interests served by section 109 is the interest of the Ontario Labour Relations Board in protecting both the appearance and the fact of its impartiality. The Board's officers and employees should not lightly be placed in a position of appearing to take sides by testifying at the instance of one of the parties to a dispute about information which they may have gained in the course of their employment with the Board. This interest is the Board's interest as an institution, not the personal interest of the Board officer or employee whose testimony is sought. That is reflected in the fact that it is the Board's consent, not the consent of the potential witness, which is required before a Board officer or employee can be compelled to testify. The provision to the Board of a discretion to consent to testimony recognizes, obviously, that there may be some circumstances in which the interests of justice override the interests which the section is designed to protect. Such circumstances may arise where it is alleged that the Board officer or employee has acted improperly in the course of his duties. Where an issue of that sort becomes relevant in a hearing before the Board, the Board's interest in the fact and appearance of its impartiality may, together with the interests of the parties and of the officer or employee in question, all make it desirable to compel or permit the officer or employee to testify. Whether that is the issue at stake or not, however, when the applicant for consent has available to it some other means of proving the facts which it wishes to elicit by means of the testimony of Board officers or employees, the Board will not ordinarily be prepared to consider granting its consent under section 109 until the applicant for consent has exhausted those other means. This approach reflects two concerns. One is that the Board embark on a balancing of the aforementioned interests only when it appears necessary, not just convenient, to use Board-employed persons as witnesses. The other concern is that an inquiry into alleged misbehavior of Board officers or employees not be taken to the point of calling on the officer or employee to account for his or her actions when all the Board has before it are unsworn and untested allegations of misconduct.

7. These applications and complaint were filed with the Board on Friday, September 13, 1985, under cover of a letter which stated that the trade union would rely on the provisions of section 8 of the *Labour Relations Act* in connection with its application for certification and that the facts alleged in that connection were the facts alleged with its section 89 complaint, as set out in a six page Appendix. In that letter counsel asked that these matters be consolidated and that the Board set aside ten days for hearing.

8. The following Monday, September 16, 1985, the Registrar's office set about preparing the usual bundle of material for mailing to the respondent employers with respect to the certification application. Pursuant to section 2 of the Board's Rules of Procedure, the Registrar fixed a terminal date of September 24, 1985, for that application and scheduled the hearing of it for Friday, October 4, 1985. On September 17, 1985, each respondent was sent three envelopes (one to each of the three municipal addresses) by Priority Post. Each contained the following letter to the respondent from the Registrar:

United Steelworkers of America, and Plaza Fiberglass Manufacturing Limited, Plaza Electro-Plating Limited, and Citron Automotive Ltd. (Municipality of Metropolitan Toronto)

I am enclosing herewith the following documents:

- (a) Form 4 (Notice of Application for Certification and of Hearing) and a copy of Form 1 (Application for Certification),
- (b) Form 6 (green) (Notice to Employees of Application for Certification and of Hearing),
- (c) Form 74 (Return of Posting Card),
- (d) Form 10 (blue) (Reply to Application for Certification) in blank, and
- (e) Schedules to Form 4.

Please read these documents carefully.

I draw your attention to section 77 (1) of the Rules of Procedure of the Board *which requires you to post immediately Form 6 (green)* on your notice boards or in such conspicuous locations on your premises (including the boiler room) as may be necessary to bring this matter to the attention of your employees who may be affected by the application.

You are required to return to this office forthwith Form 74 (Return of Posting Card) duly completed.

Copies of the Labour Relations Act are available upon request.

You will note that the Board will commence its hearing of this case in its Board Room, 6th Floor, 400 University Avenue, Toronto, Ontario, M7A 1V4, at 9:30 A.M. EDT, on Friday, October 4, 1985.

The letter of September 13, 1985, and the Appendix referred to in it were part of the certification application and copies of them accompanied each of these letters. The bundles of material sent by priority post to 70 Vanley Crescent were returned marked "unknown", but the respondents acknowledge that the other envelopes were received by them on September 18, 1985. Apart from an as yet unparticularized complaint about lack of particularity in the Appendix to the certification application and complaint, the respondents have not suggested that these materials were inadequate as notice to them of the trade union's certification application. The Form 4 notice they received required that the respondents file a reply, lists of employees and specimen employee signatures by the terminal date. The respondents have not filed any of the required materials, and did not post the green notices to employees as required by the Registrar's letter, the Form 4 notice and section 77(1) of the Board's Rules of Procedure.

9. The trade union's related employer application under subsection 1(4) and its complaint under section 89 of the Act were processed next. The Registrar fixed the terminal date for the application under subsection 1(4) as September 26, 1985, and scheduled the hearing of that application and of the section 89 complaint for October 4, 1985. The Registrar's office prepared standard form letters dated September 20, 1985, to the applicant and respondents and the material referred to in those letters. That material included notices to employees in Form 33, about which the Registrar's letter to the respondents in the related employer application said this:

It is my direction that the Notices to Employees of Application under Subsection 4 of Section 1 of the Act and of Hearing (green) be posted immediately by you, in conspicuous locations



on your premises, to bring this matter to the attention of all employees who may be affected by the Application.

The respondents acknowledge receiving the letters of September 20th and enclosures in the related employer application and section 89 complaint. Except for the aforementioned complaint about lack of particularity in the Appendix to the section 89 complaint, the respondents have not suggested that these materials were inadequate as notice to them of the application and complaint. The respondents did not post the Form 33 notices to employees.

10. On September 20, 1985, the Registrar received a letter from the applicant advising that it had been unable to confirm for the Board the posting by the respondent of notices to employees of the certification application, as the Registrar requests in his standard form letter to applicants for certification. Late that afternoon, a Labour Relations Officer attended at the offices of Plaza Fiberglas and spoke to Mr. Chelminsky.

11. Mr. Chelminsky testified that a woman came to his office that afternoon, told him she was with the Ontario Labour Relations Board and handed him a new set of materials in an envelope. She told him the Board was not sure whether the respondents had received the original mailing and that she wanted to enter the premises to post notices to employees. Mr. Chelminsky replied that Ms. Sabina Citron had that day written to the Registrar to say that the respondents had not yet obtained legal counsel and to request that the hearing of October 4, 1985, be postponed. He refused to let the Labour Relations Officer enter and post the notices. She asked if she could telephone the Registrar. He dialed the number and handed her the telephone. After speaking for a while, she handed Chelminsky the receiver and told him the Registrar wished to speak to him. The Registrar introduced himself, and said that he wanted Mr. Chelminsky to post the notices right away. Mr. Chelminsky mentioned Ms. Citron's letter and said he wanted to get legal advice. The Registrar responded in what Mr. Chelminsky at first described as a "very angry voice" and, as Chelminsky put it, "practically ordered" Chelminsky to post the notice or he would get the sheriff to make him do it. Pressed by respondents' counsel about the Registrar's tone of voice, Chelminsky described it as "very loud" and, after a pause, said "he was screaming at me".

12. When Mr. Chelminsky's telephone conversation with the Registrar came to an end, he returned the receiver to the Labour Relations Officer, who once again spoke to the Registrar and then hung up. She then told Chelminsky that her instructions were to return to the office, and that the Board would send the sheriff. She left a number of envelopes with Mr. Chelminsky.

13. On the following Monday, September 23, 1985, a solicitor engaged by the respondents wrote this letter to the Board's Solicitor:

I have considered the matters raised in our telephone conversation of this morning. I have read Section 103(2)(d)(e) which does not appear to allow for the forcing of any conduct by the Board prior to a hearing. While that may well have been your practice it appears to me to be without jurisdiction. Accordingly, it is my view that there is no power to force the posting of notices prior to a hearing.

It also is my view, that if your new revised Form either strikes out paragraph 2 in Form Six, or states that it is not applicable, you would have exceeded your authority and are without jurisdiction to issue such a form.

Regulation 546 provides that Form Six be set out in a particular way. Without information from the application, employees who desire to oppose Union Certification would have no

information upon which to base their decision. If the objective of the Form is to give employees an opportunity of replying to an Application for Certification then they must have a meaningful opportunity to consider the matter. I take the position that Form Six as set out in the regulation *must* be filled out in a way that would direct the attention of the employee to information contained in the Application.

Any attempt to force the posting of a form which is not in accordance with the Regulations would surely be detrimental to the employees and a denial of their rights.

It seems to me that your notifying the police department to accompany your officer will only exacerbate the situation. Your officer has the right to enter into the premises only for the purpose of delivering a proper notice for posting. If the notice is not posted, then you have your remedy.

It seems to me that the Ontario Labour Relations Board should not be getting involved in calling the police to aid one side of an application when the Board itself is to be sitting as an impartial arbiter to determine the merits of that application. You have shown by this conduct that you are siding with one side and have pre-determined the matter, notwithstanding the attempted delivery of a form which does not comply with the regulations.

I would ask you to first tell your officer not to deliver this defective form until you have had an opportunity to further consider my remarks; and second, to discuss the same with me.

I have not as yet been informed of the terminal date fixed for the Application pursuant to paragraph 3. As you indicated, that date would definitely not be September 24, 1985.

I would be pleased to discuss the above matters with you at our mutual convenience.

The respondents' solicitor also wrote to the Registrar that day, asking that the Registrar adjourn the scheduled hearing and contact his (the solicitor's) office to arrange a "mutually agreeable date" for hearing. The Registrar replied by letter dated September 24, 1985, which advised that the matter of an adjournment would have to be raised before a panel on the scheduled hearing date unless the requested adjournment was on consent of all parties.

14. On September 23, 1985, the Board directed the extension to September 27, 1985, of the terminal dates in both the certification application and the related employer application, and authorized a Senior Labour Relations Officer to attend at the respondent's premises and post the Form 6 Notice to Employees of the Certification Application and the Form 33 Notices to Employees of the Application under subsection 1(4) of the Act. Fresh notices were prepared to reflect the new terminal date. That afternoon, the Senior Labour Relations Officer named in the Board's authorization attended on Mr. Chelminsky and gave him copies of the authorization. He said he proposed to enter and post the notices. After the officer spoke by telephone to the respondents' solicitor at Mr. Chelminsky's request, Mr. Chelminsky advised the officer that the form he proposed to post was not complete as it did not give enough information to employees. The officer persisted; Chelminsky resisted. The officer did not attempt to use force, but said he would call the sheriff or the police. Chelminsky let the officer use his telephone to do so. After making the call, the Senior Labour Relations Officer left the premises and waited outside. He returned twenty minutes later and said that since the police had not arrived he would make a further attempt to effect the posting. Chelminsky physically prevented him from doing so. Two police officers arrived somewhat later. There was further discussion with Mr. Chelminsky, and a telephone conversation between Ms. Citron and one of the police officers, but the notices were not posted.

15. On September 24, 1985, another panel of the Board directed that the terminal date

in each of two applications be further extended to September 30, 1985, and further authorized the aforesaid Senior Labour Relations Officer to enter the premises to post the Form 6 and Form 33 Notices to Employees of those applications. The Board's administrative staff prepared revised Form 6 and Form 33 Notices reflecting the extended terminal date, and on September 26th the Senior Labour Relations Officer re-attended at the offices of Plaza Fiberglas, this time in the company of a gentleman who Mr. Chelminsky said introduced himself as "Deputy Sheriff" and displayed a badge. The Senior Labour Relations Officer told Mr. Chelminsky he was there to post fresh notices. Mr. Chelminsky reiterated the respondents' position that the notices were not complete. The Senior Labour Relations Officer said he would be entering to post the notices any way. Chelminsky asked the Sheriff's officer whether the Board's officer could force himself into the plant. The sheriff's officer answered that he was there to make sure that the Board's officer was not disturbed, that the Board's officer had the authority to enter and that he, the sheriff's officer, was prepared to arrest Chelminsky if he prevented the Board's officer from doing so. Chelminsky was shown a piece of paper which gave the Senior Labour Relations Officer authority to enter. As a result of calls placed by Chelminsky, both Ms. Citron and the respondents' solicitor spoke by telephone to the sheriff's officer. Thereafter, the Board's officer proceeded with the sheriff's officer to the door between the office area and the plant. Chelminsky blocked the door. The Board's officer physically moved Chelminsky away from the door with his hand. The sheriff's officer told Chelminsky not to touch the Board's officer. The Board's officer and the sheriff's officer proceeded into the plant and posted two notices, a notice in Form 6 and a notice in Form 33. While the title of proceeding on both forms named all three respondents, the space on Form 6 beside the words "To The Employees of:" immediately below the title was filled in with the name "Plaza Fiberglas Manufacturing Limited" only, and the corresponding space on the Form 33 was filled in only with the name "Citron Automotive Ltd."

16. After effecting posting at 4420 Chesswood, the Senior Labour Relations Officer and sheriff's officer proceeded to 4440 Chesswood. Evidence of their activities there was given by Roman Flicker, an office clerk employed by Plaza Electro-Plating, and Ken Berry, the Plant Manager at Plaza Electro-Plating. Mr. Flicker testified that two men walked into the office area at 4420 Chesswood Drive sometime between nine and ten o'clock in the morning on September 26th. He followed them through the office area into the plant, where he saw them standing beside the time clock in the plant area. One of them started to take papers and scotch tape out of a brief case. Flicker went up to him, touched him on his shoulder and told him he was not allowed to do any thing without the permission of the plant manager. The other man, who later displayed a badge, took Flicker by the arm, moved him to the wall and told him not to touch the first gentleman because he, the man with the badge, could arrest him. The man with the badge had something in his hand that looked to Flicker like a pair of handcuffs. Flicker held out his arms and invited arrest. Mr. Berry then came over and touched the man with the badge, who responded by saying "don't touch me" and displayed his badge. Flicker then went to Mr. Chelminsky's office.

17. Berry testified that after he touched the man who later displayed the badge, that man turned around and said not to touch him, that he would be charged with assault. Berry had his hands up, unconsciously pointing, and the sheriff's officer told him not to point his finger, that that was another assault. At this point the sheriff's officer had displayed his badge, and there was a discussion between the sheriff's officer and Berry about whether Berry had any rights. Berry asked to see the badge again. The officer was co-operative, he brought out his badge and showed it to Berry. The Senior Labour Relations Officer finished posting two notices and the two officers went out again through the office area.



18. As we noted earlier, the respondents' major argument is that the Board has no authority to enter on premises by force to post notices, and its having done so in this case creates a "reasonable apprehension of bias" because it gives the appearance that the Board has sided with the applicant trade union. While it is not suggested, nor is it the case, that any member of this panel participated in any decision or gave any instruction in connection with the preparation or posting of notices before our hearings commenced October 4, 1985, it is the respondents' position that the actions complained of disqualify any quorum of the Board, including this panel, from hearing the trade union's complaint and applications.

19. In the alternative, counsel said that if the Board has the authority to enter premises forcibly in order to post notices, it can only do so if the notices to be posted are authorized by and completed in accordance with the Regulations under the *Labour Relations Act*. He argued that the Form 6 notices to employees which the Board attempted to and ultimately did post were not proper, as nothing was inserted after the printed words "Your attention is directed to the following information contained in the application:" in paragraph 2 of the notices which the Board sent by mail and sought to post September 20th and 23rd and only the word "None" appeared after those words in the notices actually posted on the 26th. Counsel argued that all the information in the application for certification and the Appendix of allegations filled in support of certification under section 8 of the Act should have been inserted in or accompanied each notice. As the notices were not proper, he submitted, the Board could not authorize entry of premises to post them or the use of force in doing so and, as forcible entry did occur, the Board appears to be the ally of the trade union, with the same jurisdictional result as follows from his main argument.

20. If any panel of the Board could have jurisdiction to hear these matters, counsel argued in the further alternative that this panel is without jurisdiction because of the inclusion in the material before this panel of the detailed allegations in the Appendix to the trade union's certification application and section 89 complaint. Counsel described the allegations contained in the Appendix as "inflammatory", and argued that a reasonable apprehension that we would be unable to make a fair assessment arises from the fact that we will have read these allegations before commencing to hear evidence.

21. Even if no reasonable apprehension of bias arises from the matters complained of, counsel says that notice to the employees of the certification and related employer applications was defective, both because of the way paragraph 2 was completed in the Form 6 notices and because when notices were posted there were no Form 6 notices addressed to employees of Plaza Electro-plating and Citron and no Form 33 notices addressed to employees of Plaza Fiberglas and Plaza Electro-plating. Because of these defects, counsel would have us require the trade union to abandon those applications and file fresh ones.

22. Finally, if we reject any of these arguments counsel asks that we take no further action in these proceedings until the respondents can have a judicial review application heard. As for the scheduling of the hearing of these proceedings on the merits, counsel for the respondents estimates that twenty days of hearing would be required, twice the number estimated by counsel for the trade union. He asks that these days of hearing be arranged to suit the convenience of another lawyer whom the respondents wish to represent them and who is available for only one day in December 1985 and six days in February 1986 out of the 39 days which counsel were told were available to this panel of the Board between December 2, 1985, and February 28, 1986.

23. Since the primary focus of the respondents' submissions is on the alleged existence of a reasonable apprehension of bias, we should first take note of the legal test which is used to determine whether such an argument succeeds. From the decisions of the Ontario Court of Appeal in *Re Evans and Milton et al.* (1979), 24 O.R. (2d) 181 and *Regina v. Valente (No. 2)* (1983), 41 O.R. (2d) 187 it seems clear that the test in Ontario is as set forth by Mr. Justice de Grandpre in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at p. 394:

... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."

In applying themselves to the question in this case and obtaining thereon the necessary information, the reasonable and right-minded persons Mr. Justice de Grandpre had in mind would turn first to the *Labour Relations Act*.

24. The Legislature's objective in enacting the *Labour Relations Act* ("the Act") is reflected in the preamble to the Act, which reads:

WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

The Act requires an employer to recognize and bargain in good faith with a trade union which is certified as the exclusive bargaining agent for a unit of its employees. Unless their ability to express their wishes has been interfered with, the wishes of a majority of the employees in the appropriate unit will determine whether a trade union will be certified to represent all employees in that unit. Certification alters the legal rights and obligations of the trade union, the employees and the employer. Some employers have difficulty understanding that their right to act or speak as they wish has been limited in order to give effect to that policy and that it is their employees' wishes, and not their own, which determine whether they will become obliged to engage in collective bargaining with a trade union. The persons contemplated by Mr. Justice de Grandpre's test would not have that difficulty.

25. The Act permits a trade union to apply to this Board for certification. The Board then determines the trade union's entitlement to certification in accordance with the Act's provisions. The process by which it makes that determination is governed by the rules of natural justice and the provisions of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484. Subsection 102(13) of the *Labour Relations Act* provides that:

(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

The regulations referred to by respondents' counsel in argument, and by their solicitor in his letter of September 23rd, are Rules of Procedure made by the Board pursuant to this subsection.

26. In determining its procedure, both generally and in individual cases, the Board is guided by the need for expedition in labour relations matters generally and especially in certification proceedings. In *Journal Publishing Co. of Ottawa Ltd. et al. v. Ottawa Newspaper Guild, Local 205 et al.*, March 31, 1977 (Ont. C.A.), unreported, Estey, C.J.O. as he then was, said:

In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied.

Laskin, J.A., as he then was, made a similar observation in *Hotel and Restaurant Employees and Bartenders International Union, Local 197 et al. v. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 (Ont C.A.) at page 465:

The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to a union, to employees and to an employer since the certification is merely the first step in an often laborious collective bargaining process.

27. While certification proceedings are initiated by a trade union's application, they are the Board's proceedings. It is the Board's obligation to give notice of its hearing to those whose rights may be affected: *Statutory Powers Procedure Act*, subsection 6(1). The employees whose rights are affected are those who might fall within the bargaining unit which the Board finds appropriate for collective bargaining, but this finding is not made until after interested parties, including employees, have the opportunity of a hearing. Accordingly, notice should be given to the employees who fall within the bargaining unit described in the trade union's application and to any other employees who work in the same work place or work places with them. The ideal way to give such notice is by a posting in the work place or work places of the affected employees. Because the respondent employer can best identify the affected employees, Rule 77(1) of the Board's Rules of Procedure provides:

77.-(1) Where the registrar serves an employer with notices of application for posting, the employer shall post the notices immediately upon their receipt and keep them posted upon his premises in conspicuous places where they are more likely to come to the attention of all employees who may be affected by the application until the expiration of the terminal date for the application.

The authority for such a rule is found in paragraphs (d) and (g) of subsection 103(2) of the *Labour Relations Act*, which provide:

(2) Without limiting the generality of subsection (1), the Board has power,

- (d) to require persons or trade unions, whether or not they are parties to proceedings before the Board, to post and to keep posted upon their premises in a conspicuous place or places, where they are most likely to come to the attention of all persons concerned, any notices that the Board considers necessary to bring to the attention of such persons in connection with any proceedings before the Board;



- (g) to authorize any person to do anything that the Board may do under clauses (a) to (f) and to report to the Board thereon;

The current language of paragraph (d) results from the generalization in 1966 of the corresponding provision of the predecessor legislation (R.S.O. 1950, c.194, s.67(2)(d)), which read:

- (d) to require employers to post and to keep posted upon their premises in a conspicuous place or places where they are most likely to come to the attention of all employees concerned, any notices that the Board deems necessary to bring to the attention of such employees in connection with any proceedings before the Board;

Clause 103(2)(d) is the foundation for the obligation to post found in section 77(1) of the Rules, referred to in the Form 4 notice and explained in the Registrar's standard form letter. The concluding words of paragraph (e) of subsection 103(2) of the Act were added to its predecessor in 1961 to ensure that the Board's notices could and would be posted in the work place despite any failure or refusal by an employer or occupant to discharge its obligation to post. That paragraph gives the Board the power:

- (e) to enter any premises where work is being or has been done by the employees or in which the employer carries on business, whether or not the premises are those of the employer, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any matter and post therein any notice referred to in clause (d);

28. The Board's power to authorize persons to enter premises to post the Board's notices would be singularly ineffective for its intended purpose if, as the respondents argue, that power could be exercised only with the occupant's consent. Respondents' counsel argued that the power to use force is not necessary to the effective use of the power to enter conferred by subsection 103(2)(e) of the *Labour Relations Act* because that Act gives the Board "alternatives" to the use of force. When asked, he refused to say what those "alternatives" were because, he said, it was the Board solicitor's function to advise it, not his. We see no need to guess at an argument counsel refuses to elaborate. We are not satisfied that there is any more practical or effective alternative to posting as a means of giving notice to employees whose number and identity are unascertained, and no effective alternative to the use of reasonable force, where necessary, to ensure that adequate notice of an expeditious hearing and imminent terminal date are given effectively and without delay. Section 27(b) of the *Interpretation Act* R.S.O. 1980, c.219, provides:

27. In every Act, unless the contrary intention appears,
- (b) where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing;

With the assistance of that provision, having regard to the purpose and statutory context of subsection 103(2)(e) of the Act, we conclude that the power to enter conferred by that subsection includes the authority to use reasonable force to effect entry. We are supported in that conclusion by the opinion of the Ontario Law Reform Commission expressed at page 7 of its 1983 *Report on Powers of Entry*:

Although there is, apparently, an absence of authority in Ontario precisely on this issue, conferral of a power to enter premises would seem to grant authority to use appropriate force

to effect entry in the event of recalcitrance on the part of the occupier. [...*Grove v. Eastern Gas Board*, [1952] 1 K.B. 77 at 82, [1951] 2 All E.R. 1051 at 1053 (C.A.)...] This proposition may be supported by section 27(b) of the *Interpretation Act*. Indeed, if the position were otherwise, an entry could be effected only with the consent of the occupier, and “in such a case no statutory authorization would be required”. [*Fowler v. Taylor*, [1957] V.R. 593 (S.C.) at 596. See, also *Egg Marketing Board (N.S.W.) v. Cassar*, [1978] 1 N.S.W.L.R. 90 (S.C.)]

29. Subsection 102(3) of the Act provides that the Board “shall” determine its own practice and procedure and “may” make rules on that subject. The Board is not required to make any rules; it can determine procedure on a case by case basis, and certainly does with respect to matters not covered by the present rules. The Board’s Rules of Procedure do not make provision for every question which might come before it. No rules or forms are prescribed for an application under subsection 52(3) of the Act for consent to early termination of a collective agreement, for example. No one would seriously suggest that the absence of such rules deprives the Board of jurisdiction to entertain such an application. Similarly, the Board is not limited to the forms of notice provided for in its general rules. The Board can and does from time to time devise and require the posting of notices which differ in form or subject matter from those provided for in the Board’s rules: see *A.G. Simpson Company Limited*, [1985] OLRB Rep. Sept. 1341, at paragraphs 9 to 11, and *The Hospital for Sick Children*, [1984] OLRB Rep. Feb. 281 at paragraph 9; and see paragraph 27(d) of the *Interpretation Act*.

30. While the Board is not required to make rules in order to have procedures, without rules every procedural question, including the content of notices of hearing, would have to be determined by a quorum of the Board for each case on an *ad hoc* basis. What a rule does is make prior adjudicative determination of procedure unnecessary with respect to the subject matter of the rule. Rule 4, for example, deals with the notices to be given when a certification application is filed with the Board. The rule tells the Registrar to serve the respondent with a copy of the application, a notice in Form 4 or 5 and “an appropriate number of notices of application in Form 6 or 7, as the case may be, for posting.” This confers on the Registrar the authority to fill out these forms without reference to a quorum of the Board for approval of his draftsmanship.

31. The Registrar is not required to set out in paragraph 2 of Form 6 all of the information contained in the application for certification. If the Board had intended that the notice to be posted include all the information in the certification application, its Rules would have required that employers post a copy of the application along with the Form 6. Paragraph 2 is included in Form 6 so that the Registrar can include additional information in those cases in which he considers that desirable. Such cases are rare; paragraph 2 of Form 6 is almost always left blank. It is no more necessary for the Registrar to insert something in paragraph 2 than it is for an applicant trade union to insert something in paragraph 7 of its Form 1 application after the words “Other relevant statements (attach additional pages if necessary):” or for a respondent employer to insert something after the same words in paragraph 10 of a Form 10 reply.

32. Whether or not it is factually or legally adequate as notice of the proceedings to which it refers, a notice in Form 6 completed as he sees fit and signed by the Registrar *is* in a form authorized by the Board’s Rules of Procedure. Thus, even on the respondents’ misreading of paragraphs (d) and (e) of subsection 103(2) of the Act, these were notices the Board was entitled to post on the respondents’ premises. However, it is important to correct that misreading.

33. Paragraphs (d) and (e) of subsection 103(2) of the Act speak about “any notices the Board considers necessary.” The Board is not limited to the forms it may have prescribed in the exercise of its rule-making power. The Board may require or effect posting of any notice it considers necessary. It is implicit in the other panels’ decisions of September 23rd and 24th that they considered it necessary to effect posting of the very notices in question here. There is nothing about the manner in which the Form 6 notices were filled out which deprived the Board of its jurisdiction to authorize entry to effect their posting.

34. In summary, we conclude that the orders of September 23rd and 24th were within the jurisdiction of the Board. The Board’s officer was thereby authorized to enter the respondent’s premises without their consent and to use reasonable force in so doing. The fact that the Labour Relations Officer entered without the respondents’ permission pursuant to the order of September 24th and used reasonable force in so doing does not give rise to a reasonable apprehension that any panel of this Board would be biased in its adjudication of the matters in issue between the respondents and the applicant. Indeed, it seems to us that would be the proper conclusion even if a Board officer had gone beyond his or her legal authority in attempting to post these notices. After all, these are the Board’s notices, notices the Board is under an obligation to bring to the attention of employees without delay. The persons contemplated by Mr. Justice de Grandpre’s test would have no difficulty comprehending that each action complained of by the respondents was consistent with a *bona fide* intention in the actor to ensure the proper functioning of the Board’s own processes and assist the Board in discharging its statutory duties with the expedition of which Justices Laskin and Estey spoke in the passages quoted above. They would not conclude that the actors or the Board had allied with the applicant trade union.

35. We turn to the argument that a reasonable apprehension that this panel will be biased arises from the fact that the trade union’s detailed allegations of wrongdoing by the respondents are among the materials before us.

36. Rule 72 of the Board’s Rules of Practice requires a party to file with the Board particulars of the material facts on which he will rely if he intends to allege at hearing that another person has engaged in improper or irregular conduct. Material filed pursuant to this rule is served on the opposite party by the Board in the discharge of its obligation under section 8 of the *Statutory Powers Procedure Act*. It is also put before the panel which is to conduct the hearing in which the allegations will be made, along with any other forms or correspondence filed by the parties which outline their positions on the matters in issue between the parties. In short, particulars of alleged improper conduct form part of the “pleadings” from which the parties and the panel hearing the matter ascertain, both before and during the hearing, what case each party intends to make or has to meet. The allegations here are not unlike those with which the Board deals regularly. The most exceptional thing about them is counsel’s complaint that they say too much. The argument we usually hear is that the particulars filed with a complaint do not say enough.

37. The basic premise of the respondents’ argument on this point is that the members of this panel lack the capacity to distinguish between allegations and evidence and would fail to base their decisions only on the latter. Indeed, in the respondents’ submission our capacity to perform that most basic adjudicative function is so limited that even our hearing counsel make a full opening statement in a case of this kind would raise an apprehension of bias. We can see no merit in this argument.



38. As we turn finally to the adequacy of the notice the employees did ultimately receive, we should first make it clear that we do so because the Board is always concerned to satisfy itself that adequate notice of its proceedings has been given to interested persons, and not because we regard the respondents as having any legal right to complain about the alleged inadequacy of notice to employees or to avoid their own obligations in these proceedings on that ground (as to the respondents' having no right to do either *see Cunningham Drug Stores Ltd. v. Labour Relations Board*, [1973] S.C.R. 256 at pages 264-265 and *Canada Labour Relations Board v. Transair Limited et al.*, [1976] 1 S.C.R. 722 at pages 743-745).

39. We have already dealt with and rejected the respondents' argument that all the information in the certification application, including the allegations on which the claim for certification under section 8 is based, must be included in or accompany the notice of hearing in order for it to be a notice in Form 6. Turning from form to substance, we are equally satisfied that it is neither necessary nor desirable to include such information in the Board's notice of the application for certification. Subsection 6(2) of the *Statutory Powers Procedure Act* speaks to what is necessary in a notice of hearing. It does not require that a notice of hearing set out a detailed outline of the pleadings or the names of other interested parties or the address and telephone number of the applicant. Its requirements would be met by a completed Form 6 notice addressed to all the affected employees, with paragraph 2 left blank. As to what may be desirable in a notice beyond the bare legal requirements, brevity is the most desirable characteristic in a notice to be posted in the work place. The object is to ensure that the essential points are conveyed and not lost in a sea of detail. The existing Form 6 covers the essential points, and employees can ascertain details of the parties' filings by contacting the Board at the address indicated on the Form or simply by attending at the hearing.

40. The respondents argued that the notice of hearing should give notice of the fact that the trade union is asking to be certified pursuant to section 8 of the Act, which permits certification without a representation vote in certain circumstances without requiring that the union demonstrate the level of membership required to support an application under either section 7 or section 9. Counsel argued that an employee with knowledge of the law might be misled into thinking this is an application in which the union will not be certified without a vote unless it demonstrates that more than fifty-five per cent of the employees in the bargaining unit are members of the union. The difficulty with this argument is that an employee who knew the law would know there is more than one basis on which certification without a vote can be granted. Nothing in the Form 6 notice would suggest to that employee that the application for certification is based on one section of the Act rather than another.

41. The Form 6 notice of hearing does not purport to set out any details of the grounds on which the applicant claims certification, or of the detailed questions of fact which may have to be determined in order to adjudicate that claim. It would be impracticable, if not impossible, to do so. The union can continue to gather relevant membership evidence up to the terminal date. The employer's position on the scope of the appropriate unit and the specific identity of employees in that and the union's proposed unit are not known until after the terminal date. It is not always possible to say, at the time notice of hearing is given, whether section 8 will be invoked by the union; not infrequently, the facts on which a claim under section 8 comes to be grounded arise after the respondent employer gets notice of the application, and sometimes after hearings commence. The fluid nature of the issues is a basic characteristic of certification matters. The only certainty when the notice of hearing is prepared and posted

is that the applicant trade union is asking to be certified as exclusive bargaining agent for employees of the respondent; the matters which will be put in issue with respect to that claim are not fully ascertainable before the hearing. It is important to note that, with one exception, an interested employee is not obliged to take a position on these issues prior to the hearing, when she or he will be entitled to participate and speak to and lead relevant evidence about any issue raised by other parties. The one exception is that if evidence of employee opposition to representation by the applicant will be relied upon it must be in writing and filed by the terminal date, as the Form 6 notice states. In this context, it would be misleading to start including reference to particular issues in the notice of hearing rather than continue the Board's existing practice, which is what we find preferable.

42. The respondents' counsel also suggested that the Board should post its notices in a number of languages, including two East Indian languages whose names he had not ascertained. We are not satisfied that this is necessary, for reasons set out in *Federated Building Maintenance Co. Ltd.*, [1979] OLRB Rep. Oct. 974 at paragraphs 12 and 13.

43. The only concern we have about the notice given to the respondents' employees is that the Form 6 notice was specifically addressed only to employees of Plaza Fiberglas and the Form 33 notice was specifically addressed only to the employees of Citron. It is not hard to understand how that happened, but we have to deal with the fact that it did. It is unnecessary and would be quite inappropriate to require the filing of fresh applications. The interests of the unnotified employees will be fully protected if the terminal dates in these applications are extended and fresh notices to all affected employees posted in the respondents' premises.

44. We are under no obligation to delay our proceedings pending disposition of an application for judicial review: *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183*, [1971] 3 O.R. 832 (Ont. C.A.). We see no reason to do so in this case. Accordingly, we will deal here with the scheduling of the hearing of our hearing of the merits of these applications and complaint.

45. As we noted earlier, counsel who appeared for the respondents asked that hearing dates be scheduled to suit the convenience of the lawyer whom the respondents wished to represent them. The dates available from the Board begin in December, 1985. A number of dates are available in January and February 1986, but dates in the last week of February are no longer available and this panel's availability in March is in doubt. In any event, a hearing schedule which ended later than February, 1986, would delay disposition to an extent which is unacceptable in matters of this kind. Counsel advised that the lawyer in question was completely unavailable, for reasons not known to counsel, throughout the first six weeks of 1986. It appears, therefore, that his convenience cannot be accommodated without doing violence to the principle of expedition referred to by Justices Laskin and Estey in the passages quoted earlier.

46. We direct that these matters be scheduled for hearing on the following dates:

December 19, 1985  
January 10, 13, 14, 15  
January 27, 28, 29  
February 7, 10, 11, 12  
February 17, 18, 19

In addition, the Registrar shall schedule a pre-hearing conference with another Vice-Chairman at some time prior to December 19, 1985. The time between the first and second hearing dates will accommodate the disposition of any remaining preliminary issues and compliance with any order which may result. The blocks of dates in January and February provide hearing dates which are as contiguous and continuous as the Board's resources and caseload can permit. If counsel preferred by the parties are not available on these dates and cannot agree on any other equally expeditious series of available dates, then other counsel will have to be engaged: *Re Cockings and University Hospital Board*, (1975), 54 D.L.R. (3d) 581 at pp. 596-597 (Sask).

47. We direct that the terminal date in Board Files 1465-85-R and 1466-85-R be extended to that date which is two weeks from the date of this decision and that fresh Form 6 and Form 33 notices be prepared under the amended titles of proceeding in those files, as follows:

- a) below the title of proceeding, each notice shall be addressed as follows:

TO THE EMPLOYEES OF PLAZA FIBERGLAS MANUFACTURING LIMITED AND TO  
THE EMPLOYEES OF PLAZA ELECTRO-PLATING LIMITED

- b) the blank in the second and third lines of paragraph 1 shall be completed with the words "employees of Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Limited";
- c) paragraph 2 of Form 6 shall be left blank;
- d) the terminal date shown shall be as directed above;
- e) the hearing date shall be shown as December 19, 1985; and,
- f) in all other respects except their date, the notices shall be in the same form as those posted September 26, 1985.

Three copies of each form shall be sent to each of Plaza Fiberglas and Plaza Electro-plating at their respective addresses: 4420 Chesswood Drive and 4440 Chesswood Drive.

48. We further direct that the respondents post the notices which accompany this decision immediately upon their receipt and keep them posted upon their respective premises at 4420 and 4440 Chesswood Drive and 70 Vanley Crescent, in conspicuous places where they are most likely to come to the attention of all employees who may be affected by the applications referred to therein, until the expiration of the terminal date for the applications.

49. Stuart Netherton and James Bowman, Labour Relations Officers, are each hereby severally authorized to enter the respondents' said premises from time to time during the normal business hours to view all documents posted therein and interrogate any person found in the premises to determine whether the Board's aforesaid notices have been and remain



posted and, if those notices have not been or do not remain posted, to post further copies thereof, and to continue to do as authorized hereby until the expiration of the terminal date in the applications to which the notices relate, and to report to the Board on the results of their attendances. The authority of either of the two aforesaid persons to do as he has been hereby authorized does not require that he be accompanied by the other of the two.

50. We further direct that the respondents complete and file by the aforesaid terminal date the Schedules to the Form 4 Notices they received September 18, 1985, and the specimen signatures required by Form 4.

51. In the event any interested person files a statement of desire to make representations in connection with any of these matters, the Registrar shall advise that person of the additional dates scheduled for the hearing of these matters.

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**1461-84-R** Retail, Wholesale and Department Store Union, Applicant, v. **Sears Canada Inc.**, Respondent, v. Group of Employees, Objectors

**Bargaining Unit - Certification - Practice and Procedure - Union originally seeking certification for all employees of respondent - Subsequently seeking certification for part-time office unit - Board treating as request for amendment - Amendment allowed - Whether amendment or passage of time since filing of application cause to direct vote**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *F. W. Murray* and *W. F. Rutherford*.

**APPEARANCES:** *Hugh Buchanan* and *Frank Reilly* for the applicant; *R. J. Atkinson*, *N. A. Eber*, *K. M. Eady* and *A. E. Patry* for the respondent; *Joe Klieber* for the objectors.

**DECISION OF THE BOARD;** October 16, 1985

1. The Board delivered the following oral decision at its hearing in this matter on October 11, 1985:

The Board, differently constituted, by decision January 17, 1985, determined the description of four bargaining units arising out of this application for certification. Those units may be described loosely as the full-time and part-time employees in the respondent's store in Kingston and the full-time and part-time employees in the respondent's service center in Kingston. All four of those bargaining units excluded office and clerical staff.

The Board, in its decision of March 1, 1985, appointed a Labour Relations Officer to determine whether a group of clerical

employees in the respondent's service center should be excluded from the service center bargaining units. By decision dated September 18, 1985, the Board, differently constituted, determined that those clerical employees should be excluded from the service center bargaining units on the basis of community of interest.

The applicant now requests the Board to describe another bargaining unit comprising the part-time office and clerical employees at the respondent's service center in Kingston. The respondent contends that the applicant cannot now seek certification for another bargaining unit because the Board has already determined the description of the appropriate bargaining units in this application.

We note that the applicant originally sought certification for all employees of the respondent's service center in Kingston. Its application for certification did not purport to exclude office and clerical employees. Therefore, the employees affected by this application had adequate notice of it. An employee appeared at the hearing in this matter, but made no submissions as to whether the Board should determine another bargaining unit in the terms sought by the applicant.

It appears to us that the applicant is doing nothing more than seeking to amend its original application by seeking certification for an office and clerical bargaining unit that would have been part of the larger unit for which it originally sought certification. In our view, we should permit the amendment as requested by the applicant. We have the express authority to do so under Rule 83 of the Board's Rules of Procedure. We also adopt the approach to this issue that was followed by the Board in *MacDonald's Restaurants of Canada Limited*, [1973] OLRB Rep. May 287, application for judicial review dismissed September 26, 1973, where the Board at page 289 stated, after it agreed to the respondent's request to exclude part-time employees from the bargaining unit for which the applicant sought certification:

"However, where there is such an exclusion and an applicant trade union has sufficient membership in the part time bargaining unit which entitles it to a vote or to outright certification, the Board may also order a vote or grant a certificate to the applicant trade union for the part time bargaining unit. The Board does not require an applicant trade union to make a separate application for such a part time bargaining unit merely because the part time employees have been excluded from the full time bargaining unit. It is the Board's view that to cause an applicant trade union to make such an application in these circumstances merely creates a multiplicity of proceedings with the attendant circumstances of delay and cost to all parties involved.

We hasten to point out that while this practice is highly predictable and does occur in almost all situations, the Board does consider each fact situation pursuant to its statutory obligation under section 6 of the *Labour Relations Act* which requires it to examine the facts of each case."

This approach was also followed by the Board in *Hashman Construction - Division of Tristar Western Ltd.*, [1973] OLRB Rep. Dec. 630 where the Board stated at 633:

"In the circumstances before the Board the applicant in light of the collective agreement

raised as a bar to this application requests leave to amend the bargaining unit in order to confine the unit to those employees in the original proposed unit in the employ of the employer as of the date of the application who remain unrepresented for purposes of collective bargaining. This Board can perceive no more legitimate reason for granting such an amendment provided that it does not operate to the prejudice of any person heretofore denied notice of the proceedings. And in this regard, this Board is satisfied that no interested person will be compromised by the proposed amendment. At all material times all employees affected by this application were given notice of the proceedings.”

Since we are satisfied that the applicant’s request to amend the bargaining unit description would not involve an expansion of the bargaining unit originally proposed by the applicant, all persons affected had adequate notice of this application for certification.

Having regard to the foregoing, and the earlier decisions of the Board in this matter, the Board determines that all office and clerical employees of the respondent at its service center in Kingston regularly employed for not more than 24 hours per week and students employed as office and clerical employees during the school vacation period at the respondent’s service center in Kingston save and except foremen, managers, supervisors, persons above the rank of foreman, manager, and supervisor, security staff, personnel department staff and management trainees, constitute a unit of employees of the respondent appropriate for collective bargaining.

2. After the Board made its oral decision to proceed further with the application for certification in respect of the bargaining unit for which the applicant now seeks certification, the parties met with a Labour Relations Officer to review the level of membership enjoyed by the applicant, the lists of employees filed and the statement of desire that had been filed in a timely fashion.

3. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 27, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

4. There was an insufficient number of employees who signed the timely statement of desire to cause the Board to exercise its discretion to order a representation vote under section 7(2) of the Act since the applicant had the unqualified membership support of more than fifty-five per cent of the employees at the relevant times even if the Board assumed that the timely statement of desire was voluntary.

5. The Board, after reviewing the level of membership enjoyed by the applicant and the level of opposition to the applicant, received the submissions of the parties as to the exercise of the Board’s discretion to order a vote under section 7(2) of the Act. Following those submissions, the Board recessed and then returned and delivered the following oral decision:

Following the Board’s ruling in which it found that a unit of office and clerical employees at the respondent’s service center was appropriate for collective bargaining, the parties met with a Labour Relations Officer and reviewed the list of employees filed by the respondent. The parties were advised that the applicant had, as of September 17, 1984, the terminal date in this matter and the date which



the Board determines under section 103(2)(j) of the Act to be the time as of which it ascertains the number of employees who are members of the applicant, the membership and unqualified support of more than fifty-five per cent of the employees in the bargaining unit.

The representative of the objecting employees and the respondent submitted that the Board should exercise its discretion to order a representation vote because of the length of time that has elapsed in this matter, more than one year from the date of the application, the change in the description of the bargaining units from the unit for which the applicant originally sought certification and the change of heart among the employees in the bargaining unit.

The Board is required, by section 7 of the *Labour Relations Act*, to assess the degree of membership among employees in the bargaining unit as of a particular date, which in this case we have determined to be the terminal date in this matter, September 17, 1984. Any change of heart among employees since that date is simply not relevant to whether we should exercise our discretion to order a representation vote. Similarly, the mere passage of time from the date of application to the date of disposition of the proceeding should not cause us to exercise our discretion to order a vote for the reasons expressed by the Board in *Baltimore Air Coil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387 at 1405:

“... we need to deal with the respondent company’s position urging that the passage of time since the filing of this application justifies the directing of a representation vote. We cannot agree that a representation vote should be directed on the sole basis of the passage of time since the date of filing of this application for certification. Prior to the interim certification provisions enacted in 1975, the Board experienced many complex applications, that without the intervention of judicial review, took a very long period of time to process differences between the parties. These differences usually centered on the configuration and composition of the bargaining unit. Even today, complex applications for certification involving widespread unfair labour practices or bargaining unit problems can take more than a year to process. If the Board were to accept that the mere passage of time could so fundamentally affect the outcome of an application for certification, an unfairness would be visited on those applicants who, by no fault of their own, become involved in complex and lengthy certification matters. There may also be encouragement for some parties to seek to delay a case in order to achieve this outcome. Clearly, there are equities on both sides of this issue. The turnover in the employer’s workforce since the date of application is considerable. However, as already noted, the same level of turnover is possible in a lengthy application for certification not involving judicial review. In fact, the statute, by creating the concepts of ‘application date’ and ‘terminal date’, has considered the effects of labour force turnover and recognized that at some point in time the composition of a bargaining unit must be considered frozen to provide a stable basis for the purposes of a certification application. See *Fuller’s Restaurant*, [1980] OLRB Rep. Sept. 1289.”

As for the argument that we should order a vote because the description of the bargaining unit has changed from the description of the bargaining unit for which the applicant originally sought certification, we are satisfied that a change in the bargaining unit description does not in this case cause us to seek confirmatory evidence as to employee wishes. The Board is precluded by Rule 73 of the Board’s Rules of Procedure

from receiving oral evidence of opposition by employees to certification and cannot accept written statements of opposition unless they are filed by the terminal date. Proper evidence of opposition to the applicant contingent on the bargaining unit description was not before us in this case. Therefore, we are not persuaded that we should exercise our discretion to order a representation vote based on speculation as to what employees in the bargaining unit might have done if they had been aware that the Board would find a unit, other than the one for which the applicant sought certification, appropriate for collective bargaining.

It was also by reason of Rule 73 and our view that employee wishes at a time other than the dates prescribed by section 7 of the Act are not relevant to the exercise of our discretion that we declined to accept a statement of opposition that the representative of the employees wished to file at the hearing of this matter.

Therefore, having regard to the foregoing, and pursuant to section 7(2) of the Act, a certificate will issue to the applicant.

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**2922-84-R United Food and Commercial Workers International Union Local 175, Applicant, S. Gumpert Co. of Canada Ltd., Respondent, v. Group of Employees, Objectors**

**Bargaining Unit - Employee described as "lab technician" in fact performing quality control function - Whether quality control having community of interest with production or office units depending on facts - Person excluded from production unit**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *W. H. Wightman* and *H. Kobryn*.

**APPEARANCES:** *D. Wray* and *B. Zufelt* for the applicant; *D. N. Corbett* and *G. Johnson* for the respondent; *G. Anthony*, *W. Hiscock* and *L. Hiscock* for the objectors.

**DECISION OF THE BOARD;** October 29, 1985

# I

1. The name of the respondent is amended to read: S. Gumpert Co. of Canada Ltd.
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. When this matter came on for hearing before the Board, the parties were able to reach substantial agreement on the description and composition of the unit of employees appropriate for collective bargaining. That unit is composed of plant production personnel and can be broadly described as follows:

All employees of the respondent at Mississauga, Ontario, save and except plant supervisor, persons above the rank of plant supervisor, office and sales staff.

The parties were not able to agree on the placement of Ms. C. Calder, who occupied a position which the respondent in its reply described as "lab technician". The applicant union took the position that Ms. Calder did not share a community of interest with the other employees in the "production bargaining unit" which it seeks to represent. In the union's submission, she would be more appropriately grouped in a unit of office, clerical, sales and technical personnel. The respondent submitted that the term "lab technician" was something of a misnomer and that Ms. Calder is primarily engaged in a quality control function. As such, the respondent argued, her predominant community of interest is with the production employees and she should be included in the production bargaining unit described above. In order to resolve this question, the Board heard the parties' representations with respect to Ms. Calder's duties, as well as Ms. Calder's own characterization of her functions. The Board then heard the parties' further submissions as to the conclusion which it should reach on the basis of the material before it. As it turned out, the facts were not much in dispute.

## II

5. The respondent company produces baking products, in bulk, which are then sold to customers who retail them under their own brand names. Its plant is located at 2500 Tedlo Street in Mississauga. At the time of the application there were at least 16 production workers who are unequivocally included in the above-described production bargaining unit. The company also employs office and sales staff and a chemist described as the "research and development manager".

6. Despite her job title, Ms. Calder does not work in a laboratory. Her work area more closely resembles a domestic kitchen, since her job primarily consists of testing the quality of the company's products under conditions simulating those of a consumer. She is not concerned with health standards, nor are the tests she performs particularly sophisticated. She tests the texture, moisture content, flavour, and dependability of the company's products. She also tests the Ph (acidity) level with a simple measuring device and an electrode which is inserted into the samples. She visits the production area as necessary to test the sugar content of some of the company's products (primarily pie fillings), but her own work area is segregated from the plant, and her functions, skills, and educational background are different from those of the plant production workers. She does not do their work, nor do they do hers. Ms. Calder works in the "kitchen-lab" area with the R. & D. Manager. She has a community college certificate in food technology and was hired after serving what she described as a "internship". On the other hand, while she works side by side with, and reports to the "R. & D. Manager", their functions are different. The R. & D. Manager has a degree in chemistry.



7. There was some dispute between the parties about just how much time Ms. Calder spends in the production area, and how much interaction she has with production employees. That is not surprising, since her own evidence was somewhat equivocal and it is apparent that the degree of interaction depends, in part, upon what products the company is producing at any particular time. Ms. Calder testified that, for the most part, the production employees bring samples to her for testing and that she only has to go out on the plant floor when the number of samples provided to her is insufficient. She estimated that about seventy-five per cent of the time the samples she works on are brought to her. She sometimes conducts tests on the plant floor, but again, this depends upon the products being “run” at the time. If the company is producing cake mixes or similar baking products she spends virtually no time on the plant floor. Conversely, when the company is producing pie fillings, she may visit the production area up to a dozen times a day, for a total of perhaps three hours. She also spends a portion of her time providing samples for the sales staff. On balance, therefore, we find that the vast majority of her time is spent on her own functions and there is no substantial interaction or integration with the activities of the production personnel.

8. The production employees in the bargaining unit report to the production supervisor. Ms. Calder reports to the R. & D. Manager. Their skills and educational background are different (see *supra*). So are their hours of work. The production employees work shifts. Ms. Calder does not. Ms. Calder’s hours of work are different from those of the production employees on the “day shift”. They punch a time clock; she does not. They are paid hourly; she is on salary like the office employees. Ms. Calder’s benefits are somewhat different. When, recently, a number of the production workers were laid off, she was not. She does not use the production employees’ work entrance, she does not have the same scheduled breaks and she does not share the same recreation area. They wear blue smocks, she wears a white lab coat.

9. In connection with her quality control functions, Ms. Calder is required to fill out and file certain documents and perform related “paperwork”. However, while she uses the entrance used by the respondent’s salaried office staff, she does not perform their functions or have much relationship with them. She is responsible for first aid in the plant and also spends perhaps one-half hour per week ensuring that uniforms and work clothes, including her own, have been properly dispatched and returned from the laundry.

### III

10. On an application for certification the Board must determine whether the bargaining unit applied for is “appropriate” for collective bargaining. There are few statutory guidelines for defining this concept, but what it means, quite simply, is the group of employees whom it makes “labour relations sense” to lump together for the purposes of collective bargaining. In determining the appropriate bargaining unit, the Board considers such factors as: the community of interest of the employees; the practice or history of collective bargaining in the employer’s enterprise and generally; the desirability of separating white-collar salaried and blue-collar hourly paid employees; the aversion to fragmentation of the bargaining unit; the employer’s organizational structure; the nature of the work performed; the conditions of employment; the skills of employees; administrative or geographic circumstances; the functional

coherence or interdependence of particular groups of employees; and so on (see generally: J. Sack, Q.C. and M. Mitchell, *Ontario Labour Relations Board Law and Practice*, Butterworths, Toronto, 1985 at pages 134ff and 163). In determining the appropriate bargaining unit, the Board seeks to group together employees with sufficiently coherent employment and collective bargaining interests that the collective bargaining process can be undertaken smoothly.

11. Early on in its history, the Board made certain broad generalizations which have become incorporated into collective bargaining practice and serve as guidelines for subsequent bargaining unit determinations. We need not detail those generalizations here (but again see *Sack and Mitchell, supra*). It suffices to say that one of those distinctions has been between “blue-collar” hourly rated, plant production personnel and “white-collar” salaried office, clerical, sales and technical staff. This is not to say that the clerk and the chemist or the typist and technologist perform the same functions or even share the same status at work. It is simply that these white-collar salaried staff are sufficiently different from the hourly rated blue-collar production and maintenance employees, that the latter form an identifiable and independently “appropriate bargaining unit”.

12. Quality control and plant clerical personnel lie somewhere in between. In some situations their terms of employment and conditions of work point to a community of interest with office, clerical and technical employees, while in other situations they are clearly associated or integrated with the blue-collar plant production employees. It is a question of the strength of their affinity, or, to put the matter another way, whether the “standard” production and maintenance unit would not be appropriate unless it included them. This, of course, turns upon the facts in each particular case.

13. We have considered both the evidence and the parties’ representations. We are persuaded that, on balance, Ms. Calder should be excluded from the blue-collar production/maintenance bargaining unit which the applicant union seeks to represent. She has different working conditions, a different work area, a different educational background, different skills and functions, different hours of work, different method of remuneration, different employee benefits, and a different reporting structure. While she has contact with plant production workers, she does not perform their work, nor is such contact of such quality or frequency that she should be regarded as part of the plant production work force. Obviously, she is not a scientist or highly trained technologist, but neither is she a machine operator. We are satisfied that the appropriate bargaining unit should be framed as follows:

All employees of the respondent in Mississauga, Ontario, save and except plant supervisor, persons above the rank of plant supervisor, office and sales staff, and technical employees.

For the purpose of clarity, the term “technical employees” includes the individual currently described as the “lab technician”.

14. In support of this application for certification the applicant union filed documentary evidence of membership on behalf of well over fifty-five per cent of the employees of the respondent in the appropriate bargaining unit. There was also filed with the Board certain written statements indicating that two employees who had originally supported the union had subsequently had a change of heart, and now no longer wished to support its application for certification. The Board has determined, however, that even if this “change of heart” is

voluntary, the union will still enjoy sufficient unequivocal support to warrant certification without recourse to a representation vote. Accordingly, while the Board heard evidence concerning the origination, preparation and circulation of the statement opposing the union's certification, it is unnecessary to comment upon the candor or credibility of the witnesses giving evidence on behalf of the objecting employees. Even if their evidence were accepted in its entirety, the applicant union would still enjoy sufficient support among the employees in the bargaining unit to warrant certification.

15. We do, however, wish to make two comments, lest there be any residual misunderstandings which might detrimentally affect the parties' collective bargaining relationship. First, we are satisfied that any confusion or misunderstanding harboured by Bill Hiscock or his sister are related to their age and unfamiliarity with the collective bargaining process rather than any comments by Bruce Zufelt, an organizer for the applicant union. Mr. Zufelt did not mislead the Hiscocks in any way, they just did not completely understand what he said. Similarly, we do not think that Mr. G. Johnson, an official of the respondent, engaged in any improper or irregular conduct when he called the employees together and expressed his views about their apparent desire for trade union representation. He was simply indicating that under a formalized collective bargaining regime, the company's relationship with its employees would not be the same as it had been in the past, and that the recent wage increases granted to the company's employees had been somewhat more generous than those negotiated by some trade unions. Since both of these statements are quite true, and were not accompanied by any explicit threat, we are inclined to regard them as fair comments envisaged by section 64 of the Act.

16. Having regard to the foregoing, the Board finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit described in paragraph 13, at the time the application was made, were members of the applicant on February 8, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will therefore issue to the applicant union for that bargaining unit.

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**0437-85-R; 0438-85-U** United Steelworkers of America, Applicant, v. Antique Building Supplies Ltd. c.o.b. as **Toronto Fabricating Co.**, Respondent, v. Group of Employees, Objectors

**Certification Where Act Contravened - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Whether discharge of union's collectors unlawfully motivated - Encouragement of statements of opposition to union unlawful interference - Whether 5 out of 14 adequate support for certification under s.8**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

**APPEARANCES:** *David Nicholson* and *Paula Turtle* for the applicant/complainant; *Paul Young*, *Mark Dekleva* and *Zabeda Farnum* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD;** October 31, 1985

1. The name of the respondent is amended to read: "Antique Building Supplies Ltd. c.o.b. as Toronto Fabricating Co."
2. This is an application for certification. During the course of the first day of hearing of this matter the Board ordered that this application and the complaint filed under section 89 of the Act relating to the dismissal of two persons who had been employed by the respondent be consolidated.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The parties disagreed about the geographic scope of the bargaining unit, but were in agreement on the other elements of the bargaining unit description. After receiving the submissions of the parties, the Board issued the following oral ruling:

#### ORAL RULING

The Board finds that a municipal-wide geographic scope for the bargaining unit is appropriate. The respondent operates a sales facility at a location geographically separate from the premises at which its manufacturing employees, who are the subject of this application, work.

The parties agreed that the office and sales staff be excluded from the bargaining unit. The respondent seeks to confine the bargaining unit to a specific street address. We are satisfied that because the employees of the respondent who work at the sales facility would already be excluded from the bargaining unit, we should not limit the description of the bargaining unit to a specific street address. The Board's concern about the stability of collective bargaining structures, which causes it to describe bargaining units in terms of municipal boundaries when there is only one location within the municipality, is applicable here.

Therefore, the Board finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period constitute a unit of employees appropriate for collective bargaining.

The Board notes, that for purposes of clarity, the employees of the respondent currently working at 12 Birch Avenue are sales staff and therefore are excluded from the bargaining unit.

5. Following the Board's determination of the appropriate bargaining unit, the parties were advised of the lists of employees filed by the respondent and the membership evidence filed by the applicant. The applicant, in its application, requested certification pursuant to section 8 of the Act, and relied on the particulars filed in its section 89 complaint and additional particulars contained in a letter filed the day before the first day of hearing of this matter. The parties disagreed over which party should proceed first, with the applicant arguing that the respondent should proceed first and the respondent arguing that the applicant should proceed first. After receiving the submissions of the parties on this procedural issue, the Board ruled for brief reasons given orally at the hearing that the respondent should proceed first to lead evidence relevant to all of the issues remaining in dispute in this consolidated application for certification and unfair labour practice complaint.

6. One of the allegations made by the applicant related to the filing of employee statements in opposition to the union. Prior to any evidence being adduced, the Board showed the parties two large envelopes that had beenmailed to the Board, one which contained the employee statements and the other which contained the respondent's reply. The applicant later introduced those two envelopes as exhibits in this proceeding during the cross-examination of Mark Dekleva, the owner and president of the respondent.

7. There were timely statements of desire filed in opposition to the applicant. However, no employee appeared at the hearing on behalf of the persons who had filed those statements and no evidence was adduced to establish that they were the voluntary statements of the persons who had signed them. Indeed, the evidence of Mr. Dekleva tended to show that the circumstances relating to their origination and filing would lead the Board to the opposite conclusion. Under these circumstances, the Board gives no weight to those statements in opposition to the applicant.

8. The applicant sought certification under section 8 of the Act. It alleged that the respondent had discharged two employees, Jack Lopez and Bill Trotter, contrary to the Act, shortly after its organizing campaign among the respondent's employees commenced and that the respondent encouraged employees to write letters opposing the applicant for the purpose of filing them with the Board.

9. The respondent is engaged in the manufacture and sale of commercial and residential furniture. Mr. Dekleva testified that prior to April 1985, he was primarily involved in the respondent's administration and sales, but started working as the foreman in the plant at the beginning of April because delivery problems caused numerous customer complaints and the current foreman advised Mr. Dekleva that he was no longer interested in doing the foreman's job.

10. Mr. Dekleva was responsible for discharging both Mr. Lopez and Mr. Trotter. Mr. Lopez had been hired at the end of March, 1984, as general factory help. Mr. Lopez was discharged by Mr. Dekleva on Friday, May 10, 1985.

11. Mr. Dekleva explained that he discharged Mr. Lopez on that day because he had become angry, frustrated and simply fed-up with Mr. Lopez being late for work. On that particular day, Mr. Dekleva testified that a large item was to be delivered to a customer first thing in the morning. The respondent's driver needed a helper to deliver it. Part of Mr. Lopez's duties was to be a driver's helper. Mr. Lopez was scheduled to be at work at 8 a.m., but by 8:20 a.m. had not arrived. Mr. Dekleva, at that time, assigned another production worker to assist the driver. When Mr. Lopez arrived at 8:45 a.m., Mr. Dekleva, who was quite angry, told Mr. Lopez to go to the office to collect his papers because he was being fired.

12. Mr. Trotter was discharged on Monday, May 13, 1985. He had been hired in February 1984 as a shipper/receiver. On Friday, May 10, 1985, at about 10 a.m., Mr. Dekleva requested Mr. Trotter to prepare large garden tables for shipment. He later observed Mr. Trotter painting the heads of the metal screws used in those garden tables and spoke to him about it. Mr. Dekleva felt that Mr. Trotter was doing something clearly wrong. Mr. Dekleva told Mr. Trotter what he wanted to talk to him about these work problems that day at 4:30 p.m. Mr. Trotter advised Mr. Dekleva that he could not stay after work. Mr. Dekleva then asked Mr. Trotter to come in the next day, Saturday. Mr. Trotter did not do so. On Monday, May 13, 1985, Mr. Dekleva met with Mr. Trotter and reviewed a number of problems that he had had with Mr. Trotter's work. Mr. Dekleva testified that he formed the opinion from certain events, such as the painting of the screws and Mr. Trotter unloading some pipe lengths from a truck in an inefficient manner later that Friday, that Mr. Trotter was not thinking about his job. Mr. Dekleva also spoke to Mr. Trotter about the numerous complaints that the company had received about delivery and shipping errors. Mr. Dekleva testified that Mr. Trotter was very negative about the conversation by indicating to Mr. Dekleva that the mistakes were either not his problem or not his fault. Mr. Dekleva told Mr. Trotter that they were not communicating with one another and that since Mr. Trotter was not trying to better the situation, that his employment relationship with the company should end. Mr. Trotter then asked Mr. Dekleva if that meant he was fired, to which Mr. Dekleva responded by telling him to take it whatever way he wanted, but that he, Mr. Dekleva could not put up with Mr. Trotter's stupidity anymore.

13. Mr. Dekleva emphasized that he felt that Mr. Trotter was largely responsible for the numerous shipping errors that had been committed and that he did not seem to take any initiative to alleviate the problems that were occurring. Mr. Dekleva testified that numerous customer complaints had been received by the company and that those complaints had caused a great deal of additional work. Those complaints were also causing a great deal of stress for Zabeda Farnum, the company manager, who had to deal with the irate customers.

14. Ms. Farnum testified that she received numerous complaints about short shipments or incorrect shipments in the period March through May, 1985, inclusive. She said that there were no complaints in January, 1985, one in February, about half a dozen in March, more in April and May. The level of complaints decreased in June. Based on the oral and documentary evidence, we are satisfied that numerous mistakes had been made in the packing and shipping of the respondent's products.



15. In assessing whether the respondent's discharge of Messrs. Lopez and Trotter violated the *Labour Relations Act*, the Board must examine all of the circumstances relating to the discharge, not for the purpose of determining whether there was just cause, but only to decide whether the discharge was motivated, in whole or in part, by the employees' union activity, or their exercise of rights under the Act. The analysis the Board uses in making that determination was set out in *Alpha Laboratories Inc.*, [1981] OLRB Rep. July 823 at 824:

"In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

'... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.'

It is not the function of the Board in the present case to decide whether or not the respondent had just cause to discharge the grievors. Our jurisdiction is limited to determining whether the respondent discharged the grievors because they were supporters of the complainant trade union or were exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent's actions, as indicated by the Board in *Fielding Lumber Company* [1975] OLRB Rep. Sept. 665, at paragraph 19:

'The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* - a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.'

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determinations are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

'In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities'. (See *National Automatic Vending Co. Ltd.* 63 CLLC 16,278)...'

16. In assessing the circumstances in order to determine whether the conduct was unlawful, the Board must consider "... the existence of trade union activity and the employer's knowledge of it, [and] unusual or atypical conduct by the employer following upon his knowledge of trade union activity ..." and "... must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct ...." (See *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 299 at 301.)

17. Mr. Dekleva and Ms. Farnum both testified that they had no knowledge of any union activity on the part of their employees until they received the documents from the Board

advising them of the application for certification, which was approximately two weeks after Messrs. Trotter and Lopez were discharged. Since both Ms. Farnum and Mr. Dekleva testified that Mr. Dekleva was solely responsible for the decision to discharge the two employees, we must determine whether his explanation for the discharge and his denial of knowledge of union activity are credible.

18. Mr. Trotter testified that he, Mr. Lopez and two other employees attended a union meeting on May 8, 1985, although all of the employees had been invited. Mr. Lopez collected a number of union cards from the employees on the respondent's premises on Thursday, May 9, 1985. On Friday, May 10, 1985, after Mr. Lopez was discharged, he came back to the respondent's premises to pick up his belongings and also gave Mr. Trotter five union membership cards and some money. Mr. Trotter did not see Mr. Dekleva observe this transaction but Mr. Trotter did notice that another employee, the upholsterer, was watching the exchange between Mr. Lopez and Mr. Trotter. Shortly afterwards, two employees who had earlier signed union cards approached Mr. Trotter and asked for their cards back. He gave them back the cards they had signed. They took the cards, knelt down and burned them. Mr. Trotter took the remaining three cards to the union hall.

19. Mr. Dekleva's explanation for discharging Mr. Lopez on the Friday morning was that he was late that day for an important delivery and that although he had been late before, Mr. Dekleva was angry and became fed-up with Mr. Lopez. Mr. Dekleva would have the Board accept that it was mere coincidence that Mr. Lopez, the collector of the union's cards, was discharged the day after he collected a number of union cards from employees and two days after he and three other employees attended a union meeting. Mr. Dekleva testified that he had warned Mr. Lopez many times in the past about being late. Mr. Dekleva had told Mr. Lopez on at least three different occasions in the previous month when he had come to work late that he would be fired the next time he came in late, yet he was not discharged until on May 10.

20. Mr. Dekleva, in cross-examination, when pressed to explain the discharge of Mr. Lopez, testified that Mr. Lopez was late a lot of times, and that the respondent had in the past, and on May 10, lost production because Mr. Dekleva had to assign production workers to replace Mr. Lopez. When asked to explain what was different about May 10, Mr. Dekleva said that he became fed-up. Later, in his cross-examination, Mr. Dekleva testified that May 10 was the only time he had lost production because Mr. Lopez had been late.

21. Mr. Dekleva, when asked why Mr. Lopez had not been fired by him earlier, indicated that he wanted to be sure that Mr. Lopez was coming in late. Prior to Mr. Dekleva's starting work in the shop as a foreman, he only became aware that Mr. Lopez had been coming in late because of reports he had received from Ms. Farnum. Mr. Dekleva said that these were not sufficient grounds for discharging Mr. Lopez. Mr. Dekleva, who was working in the shop as a foreman from April 10th, 1985 onward, had warned Mr. Lopez three times that his job was in jeopardy for being late after he came to work late, but only discharged Mr. Lopez on May 10th, almost a month after he started to personally observe Mr. Lopez arriving late for work.

22. Mr. Dekleva explained Mr. Trotter's dismissal on May 13, 1985 as being the result of too many shipping mistakes and his lack of concern or initiative. The shipping errors were the primary reason for Mr. Trotter's discharge, the review of which was triggered by the events

of May 10. Mr. Dekleva testified that the two events on May 10 that caused him to review Mr. Trotter's work were Mr. Trotter not doing as he had been told with respect to the large garden tables and by not working intelligently when unloading steel tubing from a truck.

23. Mr. Dekleva became aware of numerous shipping problems as early as the end of March, 1985, because, as Mr. Dekleva testified, he met with Ms. Farnum on the last Saturday in March at which time she broke down and cried about the pressure she was under because of customer complaints. Nothing was done by Mr. Dekleva in respect of the shipping complaints until Mr. Trotter was fired on May 13, 1985, more than a month and half later. We note here that Mr. Dekleva relied on Ms. Farnum's reports of shipping errors, but that he said he would not rely on her reports concerning Mr. Lopez being late for work. Mr. Dekleva also testified in chief that Mr. Trotter came into work late several times, but in cross-examination admitted that he had not warned Mr. Trotter about being late and that he knew Mr. Trotter would come into work late so that he could accompany his wife to work. Mr. Dekleva said he was not happy with that arrangement, but put up with it and simply asked Mr. Trotter to come into work as early as possible.

24. Mr. Dekleva's explanation for the discharge of Messrs. Lopez and Trotter must also be measured against the way he dealt with other situations which would reasonably give rise to the discharge of an employee. In September of the previous year, an employee had stolen aluminum pipe from the company and had sold it. The police informed Mr. Dekleva of the theft. Mr. Dekleva knew who was responsible, but took no action against that employee. During the past winter, Mr. Lopez had damaged some property through carelessness and that damage cost the respondent \$600. Mr. Lopez was not fired at that time because Mr. Dekleva said that the respondent needed people to work in the factory. The last time prior to May 10, 1985 that the respondent had fired an employee was the previous October. The respondent had never before discharged two employees within two working days. When Mr. Trotter and Mr. Dekleva met on May 13, Mr. Dekleva raised the matter of the theft with Mr. Trotter as another example of Mr. Trotter not being careful in his work. Mr. Dekleva had not, prior to May 13, ever mentioned the theft to Mr. Trotter. Mr. Dekleva was asked in cross-examination why he had not mentioned the theft problem to Mr. Trotter prior to May 13. Mr. Dekleva responded that he did not want to cause problems in the factory, he did not want to create problems between employees. There was no satisfactory explanation provided by Mr. Dekleva as to why he did not have that same concern or reluctance about problems between employees on May 13, 1985.

25. Mr. Dekleva, after taking over as foreman, worked in the plant throughout the day, walking through the plant and talking to employees. It appeared from his evidence that Mr. Dekleva encouraged employees to communicate with him about work related problems. Mr. Trotter had no difficulty in doing so when he raised concerns with Mr. Dekleva about the lack of hot water in one of the employee washrooms. Indeed, Mr. Trotter came to speak to Mr. Dekleva about the preparation of the large garden tables for shipment. It was that conversation, initiated by Mr. Trotter, that caused Mr. Dekleva to ask Mr. Trotter to see him that afternoon to discuss work related problems.

26. In this kind of a work atmosphere, which is a relatively small workplace where communication between the owner of the respondent and the employees is encouraged, is it reasonable or probable that Mr. Dekleva was unaware of either the union meeting on May 8, or the role of Mr. Lopez as the collector of the union cards on the next day? Mr. Dekleva



denies that any employee told him about the union and says that he was unaware of it until two weeks after the discharges had occurred. We do not accept as credible Mr. Dekleva's denial. In our view, it is more probable, having regard to the timing of the discharges, the respondent's previous disciplinary responses, or lack thereof, to employee misconduct, and to the degree of communication among the employees with Mr. Dekleva that Mr. Dekleva became aware of the union's activity and the role of Mr. Lopez in that activity prior to Mr. Lopez being fired on Friday, May 10, 1985.

27. Therefore, we find that the respondent's decision to discharge Mr. Lopez, having regard to all the circumstances, was based, in large part, on Mr. Lopez's union activity. Furthermore, we are satisfied that it is more probable than not that Mr. Dekleva became aware that Mr. Lopez gave Mr. Trotter several union cards and money on May 10. Mr. Dekleva may not have been aware of Mr. Trotter's role in the union on the morning of May 10 when he asked Mr. Trotter to meet with him. Mr. Dekleva testified that he did not intend to fire Mr. Trotter on Friday when he spoke with him. Mr. Trotter received the union cards from Mr. Lopez after that conversation with Mr. Dekleva. We are satisfied that there were numerous shipping problems during the months of March, April and May, and further that Mr. Dekleva knew about them. However, we were not provided with a reasonable explanation as to why Mr. Trotter was discharged on May 13, 1985 for those shipping problems and not earlier. Thus, we find that the decision to discharge Mr. Trotter on May 13, was based, in part, on the fact that he was given union cards by Mr. Lopez and that Mr. Dekleva had reason to believe that Mr. Trotter was an employee who had joined the union.

28. Therefore, we are satisfied that the respondent discharged Messrs. Trotter and Lopez contrary to section 66 of the Act, and by so doing, interfered with the applicant contrary to section 64 of the Act and intimidated Messrs. Trotter and Lopez and the other employees of the respondent contrary to section 70 of the Act.

29. When the notices of the application for certification were received and were ultimately posted by the respondent after Mr. Dekleva spoke to his solicitor, Ben Martin, who was not associated with counsel before us, Mr. Dekleva told the employees that they had to respond to the notices one way or another, and that if people were opposed to the union, they should respond in their own language. Mr. Dekleva provided paper, pencils and envelopes for the employees to use in a room in the office area of the respondent's premises. That room is used by employees for coffee and has a fridge and coffee machine in it. Mr. Dekleva testified that he did not threaten anyone, and merely said that he told his employees, pursuant to Mr. Martin's instructions, that if they were opposed to the union, to sign statements to that effect but if they supported the union, no response was necessary. Mr. Dekleva testified that when he talked to the employees about the notice, he was asked whether the employees had to worry about their positions or jobs. He responded by saying that they need not worry because the company had a great deal of work.

30. In order for the employees to go to the room to prepare their statements, they had to enter the office area. We are satisfied that the respondent's employees would have thought that Mr. Dekleva would be likely to know or find out which employees prepared and which employees did not prepare statements in opposition to the union.

31. Mr. Dekleva testified that he spoke to employees about preparing statements in opposition to the union based on the instructions he had received from Mr. Martin. Ms.

Farnum testified that she also spoke with Mr. Martin about the notices to employees. Ms. Farnum said that Mr. Martin explicitly told her not to say anything about the notices that were on the bulletin board, that is, the Board's notices to employees. She testified that Mr. Martin also said that as she was a member of management, she was not allowed to discuss the union with the employees. He did not say anything to Ms. Farnum concerning explaining to the employees about how to respond to the notices.

32. While Mr. Martin may have said one thing to Mr. Dekleva and another to Ms. Farnum about the appropriate role of management during the time that the notices were posted, we find it unlikely that Mr. Martin gave Mr. Dekleva the instructions that he related to us in light of Ms. Farnum's testimony. We believe that Mr. Dekleva, upon becoming aware of the impropriety of his conduct, attempted to justify it by saying that he did what he did under instructions from his lawyer.

33. In cross-examination, Mr. Dekleva testified that at the time the notices to employees were on the bulletin board, he did not care whether or not the union was successful, that it was out of his hands and that the choice was for his employees to make. That response, together with Mr. Dekleva's testimony about the instructions he received from Mr. Martin, when compared to Ms. Farnum's evidence as to what Mr. Martin had told her, further reinforced our view that Mr. Dekleva's explanations for his conduct were not credible and ought not to be accepted by the Board.

34. The onset of a union to represent the respondent's employees will require the respondent to stop dealing with its employees on a one to one basis. Its ability to unilaterally implement changes in the workplace will be significantly affected. Collective bargaining, which normally follows after a successful organizing campaign and certification, will require a significant amount of time and effort on the respondent's part. In other words, collective bargaining will impose on the respondent a different method of dealing with employees that would not otherwise exist, but for a successful organizing campaign by the union. Therefore, it is quite probable that Mr. Dekleva would have desired to remain union free, not an uncommon desire for an employer that is faced with an organizing campaign for the first time. (See *Playtex Ltd.* [1972] OLRB Rep. Dec. 1027; *Pigott Motors (1961) Ltd.*, 62 CLLC 16,264.) That desire is not illegal. Union organizing among employees is likely to elicit a number of concerns in an employer that has not participated in collective bargaining previously. Apathy towards a union's organizing campaign was most unlikely for Mr. Dekleva. It is highly improbable that Mr. Dekleva would not care whether a union's attempt at organizing his employees was successful. Thus, his statement of not caring about whether the union was successful was an additional factor in our finding that Mr. Dekleva's explanations for the conduct that was in issue before us were simply not true.

35. We are satisfied that the respondent's conduct, through Mr. Dekleva, in relation to encouraging employees to write letters of opposition to the union, violated section 64 of the Act. That conduct interfered with the selection of the applicant by the employees and was undue influence by Mr. Dekleva who suggested that only the employees who opposed the union sign the statements of opposition in the room that Mr. Dekleva had prepared with paper, pencils and envelopes.

36. The applicant seeks certification under section 8 of the *Labour Relations Act*. Section 8 provides as follows:

“Where an employer ... contravenes this Act so that the true wishes of the employees of the employer ... are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

37. The Board in *DI-AL Construction Limited*, [1983] OLRB Rep. March 356 at 358 stated:

“... certification pursuant to the provisions of section 8 of the Act was designed as both a deterrent to illegal employer interference in union organizational campaigns, as well as a device to provide a meaningful and effective remedy in those cases where an employer’s interference has operated to destroy the free selection process guaranteed by section 3 of the Act. The wording of the section makes clear that certification under section 8 can only be granted if three conditions are satisfied, namely:

- (i) The Act has been violated.
- (ii) The true wishes of employees are not likely to be ascertained in a representation vote, or otherwise.
- (iii) In the opinion of the Board, the applicant has membership support adequate for the purposes of collective bargaining.”

38. The applicant has established that the first condition necessary for certification under section 8 has been met. We have found that the respondent’s conduct described earlier violated sections 64, 66 and 70 of the *Labour Relations Act*.

39. We are also persuaded that the applicant enjoys membership support adequate for the purposes of collective bargaining. At the hearing of this matter, the Board informed the parties and the parties were agreed that if the Board found that Messrs. Trotter and Lopez had been discharged contrary to the *Labour Relations Act*, the applicant had, at the relevant times, 5 employees as members among the 14 employees in the bargaining unit. Membership support adequate for collective bargaining under section 8 does not require a majority of employees to join the union. If the union can demonstrate that it has a significant degree of support within the bargaining unit, it can at least commence to engage in meaningful collective bargaining. The Board cannot compel the employees to join or support the union during the bargaining for the first collective agreement. It can, however, under section 8, permit the union to begin to bargain and attempt to obtain further support among the employees in order to enhance its bargaining power with the employer. The degree of membership support that is adequate for collective bargaining can vary, depending on the individual circumstances of the case.

40. In *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848, the Board set out its approach to assessing whether a union seeking certification under section 8 of the Act has membership support adequate for the purposes of collective bargaining at 1859-60:

“The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:



No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

Some of the circumstances or factors which have been considered by the Board in assessing 'adequacy' are:

- (1) the stage of the union's campaign at which the employer conduct occurred (*Skyline Hotel Limited*, *supra*; *District of Algoma Home for the Aged (Algoma Manor)*, *supra*);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed - 'the chilling effect' (*K-Mart*, [1981] OLRB Rep. Jan. 60.);
- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Somerville Belkin*, *supra*)."

41. In this case, the applicant's organizing campaign had just started when the illegal conduct had occurred. The day before Mr. Lopez was fired, he had collected five union cards, two of which were not submitted as membership evidence because Mr. Trotter had returned them to the employees at their request who then burned them. In this case, the union's organizing was effectively terminated by reason of the respondent's discharge of Mr. Lopez on Friday, May 10 and of Mr. Trotter on Monday, May 13. In this regard, the Board noted in *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811 at 1830:

"... the Legislature appears to have clearly contemplated the application of the new section (7a) [now 8], in appropriate cases, to situations where the applicant's membership support fell even below the minimum level required in the statute for entitlement to a representation vote. (See *Lorain Products*, [1977] OLRB Rep. Nov. 734.) This section could now apply, in other words, to situations where the employer's response is so massive and so early as to prevent a trade union from ever attaining a level of support needed for a vote."

42. We are also satisfied that the respondent's swift removal from the workplace of Mr. Lopez the day after he began soliciting membership in the applicant, and the discharge the next working day of Mr. Trotter, who had received the union membership cards from Mr. Lopez, satisfies us that the true wishes of the employees are not likely to be ascertained in this case. The Board in *DI-AL Construction Limited*, *supra*, stated at page 360:

"A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these

circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote. Accordingly I am of the view that the applicant should be certified pursuant to the provisions of section 8 of the Act."

43. Our view of this element of the applicant's request for certification under section 8 is further reinforced by the evidence of Mr. Dekleva concerning his discussions with the employees at the time the notices of the application were posted and he was being asked whether they had to worry about their jobs. The discharge of the two employees, one of whom was known to the other employees as being the union's principal collector of cards and the other as being the person who received the cards after the collector was fired, conveys a clear message that the employees who support the union do so at the risk of their job. This also gives rise to a finding that the true wishes of the employees are not likely to be ascertained. (See *Dylex Limited*, [1977] OLRB Rep. June 357; *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338; *DI-AL Construction Limited*, *supra*; *The Globe and Mail*, [1982] OLRB Rep. Feb. 189; *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564.)

44. All three elements necessary for certification under section 8 have been established by the applicant. The purpose of certification under section 8 was expressed by the Board in *Manor Cleaners*, *supra*, at page 1858 as follows:

"The purpose of section 8 is aimed at redressing the rights of employees and their trade union when an employer has committed breaches of the Act so flagrant as to inhibit the ability of the employees to freely choose whether or not they wish to be represented by a trade union, be it by way of signing cards or by way of casting a ballot in a representation vote. . . . Section 8 was designed to eliminate a respondent's 'reward' for breaches of the Act which have resulted in a depressed membership evidence such that so few cards were signed either that certification without a vote cannot occur or that a vote never could have been ordered in the first place . . . ."

45. We are satisfied that certification under section 8 in this case would be consistent with the legislative purpose for its enactment and therefore we hereby exercise our discretion to certify the applicant as the bargaining agent for the employees in the bargaining unit described in paragraph 4 above.

46. A certificate will issue.

47. Furthermore, since we have found that the respondent violated the Act, the Board hereby directs the respondent, pursuant to section 89:

- (a) to forthwith offer to reinstate Bill Trotter and Jack Lopez to employment to the positions that they held immediately prior to their discharge;
- (b) to pay to Jack Lopez and Bill Trotter compensation for their loss of wages and benefits;
- (c) to pay Jack Lopez and Bill Trotter interest on the compensation ordered by the Board, such interest to be calculated in the manner described in Practice Note No. 13, dated September, 1980;
- (d) to sign and post copies of the attached Notice marked "Appendix"

as supplied by the Board in conspicuous places on its premises and to keep such notices posted for sixty (60) working days and to take all reasonable steps to ensure that the Notices are not altered or defaced or covered by any other material;

- (e) to provide reasonable access to a representative of the applicant to permit the applicant to satisfy itself that the respondent has complied with this posting order;
  - (f) to give to representatives of the applicant an opportunity to hold two separate meetings, the first of which will occur within the two weeks of the receipt of this decision or at a time satisfactory to the applicant, with all employees, without loss of pay, on the respondent's premises during working hours but without out the presence of any member of management. The second meeting will be held in the same fashion at a time satisfactory to the applicant. Each of these meetings may be as much as one hour in length. The respondent is further directed to require all employees to attend such meetings.
  - (g) for one year from the date of this decision or until a first collective agreement is reached, whichever occurs first, to give reasonable notice to the applicant and permit access to the applicant to any future meeting of the employees sponsored by or called by the respondent which involves a discussion relating to collective bargaining with equal time to be afforded the applicant's representatives to respond at the meeting.
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## Appendix

### The Labour Relations Act

# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THIS NOTICE IS BEING ISSUED IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD THAT WAS MADE AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;  
TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP,  
THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;  
TO ACT TOGETHER FOR COLLECTIVE BARGAINING;  
TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU,  
TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO PARTICIPATE  
IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT DISCHARGE OR THREATEN TO DISCHARGE ANY EMPLOYEE  
BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN  
OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS  
UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO  
LABOUR RELATIONS BOARD.

WE WILL PROVIDE REPRESENTATIVES OF THE UNITED STEELWORKERS  
OF AMERICA ACCESS TO OUR PREMISES DURING WORKING HOURS FOR  
THE PURPOSE OF CONDUCTING TWO SEPARATE MEETINGS OF THE  
EMPLOYEES IN THE BARGAINING UNIT OUT OF THE PRESENCE OF  
ANY MEMBER OF MANAGEMENT.

WE WILL FOR ONE YEAR OR UNTIL A FIRST COLLECTIVE AGREEMENT  
IS REACHED, WHICHEVER OCCURS FIRST, PROVIDE REPRESENTATIVES  
OF THE UNITED STEELWORKERS OF AMERICA ACCESS, WITH REASONABLE  
NOTICE BEFOREHAND, TO ANY MEETING OF EMPLOYEES SPONSORED BY  
US WHICH INVOLVES THE DISCUSSION OF THE PROS AND CONS OF  
COLLECTIVE BARGAINING, WITH EQUAL TIME TO BE AFFORDED THE  
UNION REPRESENTATIVES TO RESPOND.

ANTIQUE BUILDING SUPPLIES LTD.  
C.O.B. AS TORONTO FABRICATING CO.

PER: \_\_\_\_\_  
(AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

**0530-85-R Alliance Employees' Union, Applicant, v. Union of Canadian Transport Employees, Respondent**

**Certification - Practice and Procedure - Parties agreeing on unit and employees in unit at meeting with officer - No challenge made at vote - Board not permitting party to resile from agreement and challenge employee's eligibility after votes counted**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *F. W. Murray* and *R. Wilson*.

**APPEARANCES:** *James B. McCullough* for the applicant; *Robert G. Cox* for the respondent.

**DECISION OF THE BOARD;** October 18, 1985

1. This application for certification was filed May 30, 1985. The respondent employer is a trade union. The applicant seeks exclusive bargaining rights for the respondent's office support staff, for whom the Canadian Union of Staff Officers held bargaining rights at the time the application was filed.

2. On June 27, 1985, one of this Board's Labour Relations Officers spoke by telephone to Mr. Cox, the President of the respondent, who provided the officer with the names of six persons employed by the respondent, and took the position that two of these - Fred Holloway, Financial Administrator and Jan Baskin, Secretary to the President - should be excluded from the unit. Joan Connerty was one of four employees whom Mr. Cox identified as falling within the proposed bargaining unit, which he agreed was appropriate for collective bargaining. As a result of this discussion and telephone discussions between the Labour Relations Officer and a representative of the applicant, the parties came to agreement on all matters in dispute between them and further agreed to waive their right to a formal hearing, as was noted in the Board's decision herein dated June 28, 1985. That decision directed that a representation vote be taken among employees in the bargaining unit, and that vote was conducted July 11, 1985, in accordance with arrangements agreed upon in the June 27th discussions between the Board's Labour Relations Officer, Mr. Cox for the respondent and Mr. Yaremko for the applicant. All four persons on the agreed-upon list of eligible voters, including Joan Connerty, attended and cast ballots. No one was in attendance as scrutineer for the respondent. No challenge was made to the eligibility of any of the voters. The ballots were counted after the poll closed. All four ballots cast were marked in favour of the applicant. The Returning Officer set out the results of the vote in his report dated July 11, 1985. Notice of that report was given to all parties, and to bargaining unit employees, in Form 70, which invites representations "as to any matter relating to the representation vote, or as to the accuracy of the report, or as to the conclusions the Board should reach in view of the report ...".

3. Mr. Cox then wrote this letter of July 18, 1985 to the Board:

I am writing in regard to a recent vote by the employees of the Union of Canadian Transport Employees held on July 11, 1984.

I wish to have a hearing before the Board in light of the fact that Mrs. Joan Connerty voted. I was not present and would have challenged her right to vote based on the attached letter.

We very strongly feel that due to Mrs. Connerty's job, (description attached), that she is in fact a confidential exclusion.

Attached to this letter is a copy of a "Personal and Confidential" letter dated July 10, 1985 from Mr. Cox to Mr. Ray Carriere, President of the incumbent Canadian Union of Staff Officers. That letter reads:

Enclosed please find job description for Account Clerk - Pay and Benefits. You will notice that the job description has been signed by Management and the incumbent in the position.

It is the unanimous decision of the Management Committee of UCTE, after careful review, that this position, by the duties contained in the job description is of a confidential nature. To this end the position will be classified as a confidential exclusion, effective July 10, 1985.

Attached to the copy of the letter from Cox to Carriere is a photocopy of a job description apparently signed by Ms. Connerty and Mr. Cox and dated by each of them as of March 22, 1984.

4. As a result of the letter Mr. Cox wrote to the Board, this matter was scheduled for further hearing on August 29, 1985. That hearing was adjourned, on consent of the parties, to September 30, 1985. At that hearing, in answer to questions from the Board, Mr. Cox acknowledged that Ms. Connerty had been named by him as an employee in the bargaining unit during his conversation with the Board's Labour Relations Officer. He acknowledged Ms. Connerty had been named on the list of eligible voters posted in accordance with the Board's direction. He acknowledged that no challenge had been made to Ms. Connerty's status on the day of the vote; he explained that both he and Wayne Elliot, the designated scrutineer, had been detained elsewhere that day.

5. This Board has consistently held that parties should not be permitted to later resale from agreements made in earlier stages of certification proceedings: see, for example, *Daisons Press Limited*, [1964] OLRB Rep. Aug. 215; *Bertie District High School Board*, [1964] OLRB Rep. Aug. 231; *Warner Brothers Distributing (Canada) Limited*, [1974] OLRB Rep. Dec. 883; and, *J J's Restaurants Limited*, [1977] OLRB Rep. July 465. Mr. Cox said Joan Connerty was in the bargaining unit on June 27, 1985. The applicant agreed. The voters' list was settled on the basis of that agreement. Nothing has been filed or said that would suggest her duties and responsibilities changed in any way after June 27th. The claim that she should be excluded is based on a job description in existence long before that date. Even if Ms. Connerty's job duties had changed after the voters' lists were finalized, if the respondent proposed to challenge her eligibility to vote, it had an obligation to raise that challenge in a timely fashion at the time of the vote, not afterwards when Ms. Connerty's ballot had been counted along with those of the other employees in the bargaining unit. In any event, it is apparent, as Mr. Cox acknowledged at hearing, that the effect to be given to the vote would have been the same whether or not Ms. Connerty had been permitted to vote, since the applicant would have received the vote of every eligible voter in either event.

6. Our function at this stage of these certification proceedings is to determine what effect, if any, should be given to the results of the vote conducted July 11, 1985. In these circumstances, having regard to the outcome of that vote, we are satisfied that the applicant is entitled to be certified, and a certificate will issue to the applicant with respect to the bargaining unit described in paragraph 3 of the Board's decision of June 28, 1985.



**1248-85-R; 1317-85-R The Regional Municipality of Waterloo, Canadian Union of Public Employees, and its Local 1883, Applicants, v. The Ontario Public Service Employees Union, and the Crown in Right of Ontario, Respondents**

**Crown Transfer Act - Whether transfer of undertaking from crown to employer - Whether legal authority to make transfer relevant - Transfer resulting in intermingling of six former crown employees with large work force - Crown collective agreement declared not binding on employer**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *J. A. Ronson* and *L. C. Collins*.

**APPEARANCES:** *Brian P. Smeenk*, *Paul A. Young*, *L. Lewis*, *G. Brillinger* and *P. Johnson* for The Regional Municipality of Waterloo; *Raj Anand* and *Ivor Oram* for the Ontario Public Service Employees Union; *C. M. Mitchell* for the Canadian Union of Public Employees and its Local 1883; no one appearing for the Crown in Right of Ontario.

#### **DECISION OF THE BOARD; October 8, 1985**

1. These are two applications made under the *Successor Rights (Crown Transfers) Act*, R.S.O. 1980, c.489. At the hearing of this matter, the parties agreed and the Board directed that these two applications be consolidated, with the applicants being The Regional Municipality of Waterloo and the Canadian Union of Public Employees and its Local 1883 and the respondents being the Ontario Public Service Employees Union and the Crown in Right of Ontario.

2. The Board delivered the following oral decision at the conclusion of its hearing in this matter:

The central issue before the Board in this case is whether there has been a transfer of an undertaking from the Crown to the Regional Municipality of Waterloo. The parties agreed that the work now performed by the Regional Municipality of Waterloo that was formerly performed by the Crown was the administration of the *Family Benefits Act*, R.S.O. 1980 c.151, in respect of employable sole support parents, and that such work is an undertaking within the meaning of section 1(1)(h) of the *Successor Rights (Crown Transfers) Act*.

We are satisfied that the work in question is now performed by persons employed by the Regional Municipality of Waterloo. Six of those employees were formerly employed by the Crown and had accepted employment with the Regional Municipality of Waterloo.

Counsel for the respondent Ontario Public Service Employees Union forcefully argues that no transfer has occurred because the Crown did not have statutory authority to have this work performed by persons who are not crown employees. He submits that since no legal transfer

could be made by the Crown without express legislative authority, no transfer within the meaning of the *Successor Rights (Crown Transfers) Act* could have occurred.

We do not agree. In the *Corporation of the Regional Municipality of Sudbury* decision, [1981] OLRB Rep. March 251, the transfer in question was subject to Ontario Municipal Board approval. We adopt the Board's approach in that case at paragraph 10 where the Board stated:

"It goes without saying that in this Province a municipality can do those things which it has the statutory power to do under *The Municipal Act*, R.S.O. 1970, c.284 as amended, subject to all of the conditions set out in that legislation. It appears that as a matter of municipal law the acquisition from the Crown of sewage and water works by a municipality is subject to the approval of the Ontario Municipal Board. It must be emphasized that we are not here concerned with whether there has been a 'transfer' within the technical sense of *The Municipal Act*. The threshold issue is whether there has been a 'transfer' for the purposes of *The Successor Rights (Crown Transfers) Act*, 1977. The meaning of the word 'transfer' within *The Successor Rights (Crown Transfers) Act*, 1977, must, like the words 'sale of a business' in section 5 of *The Labour Relations Act*, be construed having regard to the purposes of that legislation (cf *Thorco Manufacturing Ltd.* 65 CLLC 16,052). The Act is designed to quiet disputes about bargaining rights and provide relief to employers, employees and unions alike when there has been a change of employer as an undertaking passes from the public sector to the private or *vice versa*. It is in that sense that the word 'transfer' as defined in section 1(1)(f) of the Act is to be construed."

While the legal authority of the Crown to effect a transfer may be a relevant consideration in determining whether a transfer within the meaning of the *Successor Rights (Crown Transfers) Act*, has occurred, it is not determinative of the issue. It is clear to us that the Crown has conveyed the administration of a part of its *Family Benefits Act* program to the Regional Municipality of Waterloo and we do not need to determine whether the Crown has done so legally. We do note however that the Divisional Court in the *Ontario Public Service Employees Union and Margaret Meierhoff*, unreported decision, January 28, 1985, leave to appeal denied, March 4, 1985, has opined that the Crown did have the legal authority to do so.

Since it is clear to us that there has been an intermingling of employees formerly employed by the Crown with employees of the Regional Municipality of Waterloo represented by the Canadian Union of Public Employees and its Local 1883 pursuant to its collective agreement with the Regional Municipality of Waterloo, and the employees in the bargaining unit represented by the Canadian Union of Public Employees and its Local 1883 far outnumber the six employees that are currently represented by the Ontario Public Service Employees Union, we hereby declare, pursuant to section 5 of the *Successor Rights (Crown Transfers) Act* that:

- a) the Regional Municipality of Waterloo is no longer bound by the collective agreement between the Ontario Public Service Employees Union and the Crown and

- b) the Canadian Union of Public Employees and its Local 1883 is the bargaining agent for all of the employees in the bargaining unit described in the collective agreement between the Canadian Union of Public Employees and its Local 1883 and the Regional Municipality of Waterloo, which of course, now includes those six employees who were formerly employees of the Crown.
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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1985

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**1461-84-R:**Retail, Wholesale and Department Store Union, (Applicant) v. Sears Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #2: "all employees of the respondent at its service centre in the City of Kingston regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except foremen, managers, supervisors, persons above the rank of foreman, manager and supervisor, security staff, personnel department staff, management trainees and office and clerical staff." (179 employees in unit). (*Clarity Note*).

**2243-84-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Agricola Construction Company Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

**0174-85-R:**Ontario Nurses' Association, (Applicant) v. Corporation of the County of Victoria (Victoria Manor), (Respondent).



Unit: "all graduate and registered nurses employed in a nursing capacity by the respondent in Lindsay, Ontario, save and except the director of nursing and persons above the rank of director of nursing and inservice co-ordinator/director of resident care." (17 employees in unit).

**0564-85-R:**Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Star Quality Office Furniture Mfg. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Concord, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

**0718-85-R:**Canadian Union of Public Employees, (Applicant) v. Extendicare Health Services Inc., (Respondent).

Unit: "all office and clerical employees of the respondent regularly employed for not more than twenty-four (24) hours per week at Laurier Manor in Ottawa, save and except employees in bargaining units for which any trade union held bargaining rights as of June 20, 1985, being the date of application." (5 employees in unit). (*Having regard to the agreement of the parties*).

**0924-85-R:**London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Craigwiel Gardens c.o.b. as Craigholme Nursing Home, (Respondent).

Unit: "all employees of the respondent at Ailsa Craig, save and except supervisors, persons above the rank of supervisor, professional nursing staff, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

**0972-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Nipissing District Roman Catholic Separate School Board, (Respondent).

Unit: "all employees of the respondent in the Districts of Nipissing and Muskoka regularly employed for not more than twenty-four hours per week and students employed during the school vacation period engaged in maintenance, services and plant operations, save and except plant officer, persons above the rank of plant officer, office staff, and persons for whom any trade union held bargaining rights on the date of application, July 16, 1985." (14 employees in unit). (*Having regard to the agreement of the parties*).

**0999-85-R:**Labourers' International Union of North America Local 527, (Applicant) v. Enercom Construction Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (19 employees in unit).

Unit #2: "all carpenters and truck drivers employed by the respondent and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**1022-85-R:**United Steelworkers of America, (Applicant) v. Macotta Company of Canada Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, draughtsmen, office, clerical and sales staff." (68 employees in unit). (*Having regard to the agreement of the parties*).

**1042-85-R:**Health, Office and Professional Employees, a division of Local 206, United Food and Commercial Workers, chartered by the United Food and Commercial International Union, C.L.C.-C.I.O.-A.F.L., (Applicant) v. Regional Municipality of Peel, (Respondent).

Unit #1: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in the Vera M. Davis Community Care Centre, in Bolton, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, office and clerical staff." (30 employees in unit). (*Having regard to the agreement of the parties*).

**1082-85-R:**Service Employees International Union Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Brantwood Residential Development Centre, (Respondent).

Unit: "all employees of the respondent in Brantford, Ontario, save and except professional medical staff, registered graduate and undergraduate nurses, office and clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in the bargaining units for whom a trade union held bargaining rights on July 29, 1985, being the date of application." (23 employees in unit). (*Having regard to the agreement of the parties*).

**1103-85-R:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. United Co-operatives of Ontario, (Respondent).

Unit: "all employees of the respondent at Cottam and Essex, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*).

**1158-85-R:**Energy and Chemical Workers Union, (Applicant) v. Freeze-Dry Foods, a Division of Hardee Farms International Ltd., (Respondent).

Unit: "all employees of the respondent at Oakville, save and except foremen, persons above the rank of foreman, office, technical and clerical staff, laboratory personnel, packaging room supervisor, persons employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

**1171-85-R:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC), (Applicant) v. 530810 Ontario Limited c.o.b. as O'Tooles Roadhouse Restaurant, (Respondent).

Unit #1: "all employees of the respondent at 355 Rexdale Blvd., Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at 355 Rexdale Blvd., Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor and office staff." (10 employees in unit). (*Having regard to the agreement of the parties*).

**1172-85-R:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Corporation of the City of Toronto, (Respondent) v. Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43, (Intervener).

Unit #1: "all journeymen insulators and asbestos workers and apprentice insulators and asbestos workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman and persons employed in the bargaining unit for which the intervener held bargaining rights as of August 9, 1985." (2 employees in unit).

Unit #2: "all journeymen insulators and asbestos workers and apprentice insulators and asbestos workers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman and persons employed in the bargaining unit for which the intervener held bargaining rights as of August 9, 1985." (2 employees in unit).

**1179-85-R:**Ontario Public Service Employees' Union, (Applicant) v. Sheila Leeder carrying on business as Mallorytown Residence, (Respondent).

Unit #1: "all employees of the respondent in the County of Leeds, save and except administrator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the County of Leeds regularly employed for not more than 24 hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

**1180-85-R:**United Brotherhood of Carpenters & Joiners of America, (Applicant) v. Greg Bellemare Drywall Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of



Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

**1181-85-R:** Service Employees International Union Local 204, (Applicant) v. Rosebank Villa, (Respondent).

Unit: “all employees of the respondent in Pickering, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical staff, office and clerical staff, supervisors and persons above the rank of supervisor.” (43 employees in unit). (*Having regard to the agreement of the parties*).

**1182-85-R:** The Canadian Union of Public Employees, (Applicant) v. Ward 9 Senior Link, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor.” (17 employees in unit). (*Having regard to the agreement of the parties*).

**1202-85-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. Giant Timber Industries Limited and Cadillac Building Products Company, (Respondents).

Unit #1: “all employees of the respondent Giant Timber Industries Limited in the Township of West Lincoln, save and except foremen, persons above the rank of foreman, office and sales staff.” (45 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent Cadillac Building Products Company in the Township of West Lincoln, save and except foremen, persons above the rank of foreman, office and sales staff.” (5 employees in unit). (*Having regard to the agreement of the parties*).

**1204-85-R:** Ontario Nurses’ Association, (Applicant) v. Extendicare Health Services Inc., (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent in Haileybury, Ontario, save and except the Administrator, persons above the rank of Administrator, persons regularly employed for not more than twenty-four (24) hours per week, and employees in the bargaining units for which any trade union held bargaining rights as of August 13, 1985.” (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent in Haileybury, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except the Administrator, persons above the rank of Administrator, and employees in the bargaining units for which any trade union held bargaining rights as of August 13, 1985.” (3 employees in unit). (*Having regard to the agreement of the parties*).

**1213-85-R:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen - Local #3, (Applicant) v. Dejayko Masonry Ltd., (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

**1224-85-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Craigwiel Gardens c.o.b. as Craigholme Nursing Home, (Respondent).

Unit: "all employees of the respondent at Ailsa Craig regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff." (28 employees in unit). (*Having regard to the agreement of the parties*).

**1242-85-R:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Bidwell Investments Limited c.o.b. as President Motor Hotel, (Respondent).

Unit: "all employees of the respondent in Sudbury, save and except department managers, persons above the rank of department manager, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of August 16, 1985." (34 employees in unit). (*Having regard to the agreement of the parties*).

**1251-85-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Fidinam (Canada) Limited, (Respondent).

Unit: "all employees of the respondent at 2 Bloor St. East, Toronto engaged in cleaning and maintenance, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

**1264-85-R:** LIUNA Local 607, (Applicant) v. Intrusion-Prepakt Limited, (Respondent).

Unit: "all construction labourers and carpenters in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**1271-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Rumble Contracting Limited, (Respondent).

Unit: "all employees of the respondent working at its shop at 1280 Shawson Drive, Mississauga, save and except foremen and those above the rank of foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1274-85-R:**Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Maple Roll Leaf Co. Limited, (Respondent).

Unit: "all employees of the respondent in Windsor, save and except supervisors, those above the rank of supervisor, clerical, office and sales staff, laboratory technicians, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (28 employees in unit). (*Having regard to the agreement of the parties*).

**1279-85-R:**International Woodworkers of America, (Applicant) v. Kings-Wood Frame Mfg. Corporation, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (53 employees in unit). (*Having regard to the agreement of the parties*).

**1290-85-R:**International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 834, (Applicant) v. Taunton Fabricating Ltd., (Respondent).

Unit: "all employees of the respondent at or out of Ajax, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (25 employees in unit). (*Having regard to the agreement of the parties*).

**1291-85-R:**United Brotherhood of Carpenters and Joiners of America Local 2965, (Applicant) v. Montreal Parquetry Floors Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1294-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Concorde Maintenance Limited, (Respondent).

Unit: "all employees of the respondent at 145 King St. West, Toronto, engaged in cleaning and janitorial services, save and except supervisors and persons above the rank of supervisor." (26 employees in unit). (*Having regard to the agreement of the parties*).



**1296-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Zellers Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its warehouse operations in Brampton, Ont., save and except supervisors, persons above the rank of supervisor, office and clerical staff, coordinators, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (80 employees in unit). (*Having regard to the agreement of the parties*).

**1316-85-R:**Labourers' International Union of North America, Local 491, (Applicant) v. Nora Construction Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1322-85-R:**London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Caressant Care Rest Home, (Respondent).

Unit: "all employees of the respondent in St. Thomas regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office and clerical staff." (9 employees in unit). (*Having regard to the agreement of the parties*).

**1329-85-R:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and Local 128, (Applicant) v. Teledyne Industries Canada Limited, (Respondent).

Unit: "all employees of the respondent at its Teledyne Laars Canada Division in the town of Oakville, save and except assistant supervisors and those above the rank of assistant supervisor, office staff, field service personnel, engineering personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (29 employees in unit). (*Having regard to the agreement of the parties*).

**1349-85-R:**United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. Omico Mechanical Limited, (Respondent).

Unit #1: "all sprinkler fitters and sprinkler fitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all sprinkler fitters and sprinkler fitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the

geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**1362-85-R:** Canadian Union of Public Employees, (Applicant) v. The Board of Education for the City of Hamilton, (Respondent).

Unit: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week as caretakers, maintenance, drivers, warehouse, cleaning, and cooking personnel, save and except teachers’ aides, orthopaedic assistants, cafeteria and lunchroom supervisors, office staff, foremen and persons above the rank of foreman, co-op students on work experience as part of a stationary engineering course from a community college, supply and occasional teachers, summer and evening school teachers and students employed during the regular school vacation period.” (32 employees in unit). (*Having regard to the agreement of the parties*).

**1367-85-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Zellers Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at its warehouse operations in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, co-ordinators, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (24 employees in unit). (*Having regard to the agreement of the parties*).

**1368-85-R:** Ironworkers District Council of Ontario, (Applicant) v. Bennett & Wright Limited, (Respondent).

Unit #1: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in unit).

Unit #2: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in unit).

**1375-85-R:** Guelph Typographical Union, Local 391 of the International Typographical Union, (Applicant) v. Guelph Printing Service Limited, (Respondent).

Unit: “all production employees of the respondent employed in Guelph, Ontario, save and except the general manager, persons above the rank of general manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (4 employees in unit). (*Having regard to the agreement of the parties*).

**1382-85-R:** United Steelworkers of America, (Applicant) v. Metropolitan Wire (Canada) Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen and those above the rank of foreman, and office, clerical and sales staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

**1390-85-R:**United Steelworkers of America, (Applicant) v. Lee Canada Inc., (Respondent).

Unit: "all employees of the respondent in North Bay save and except instructing supervisors, persons above the rank of instructing supervisor, office staff, sales staff and technical staff." (155 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1448-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Paradise Excavating Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**1077-85-R:**Canadian Union of Public Employees, (Applicant) v. Dundas Manor Limited, (Respondent).

Unit: "all employees of the respondent in Winchester, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, graduate and undergraduate dietitians, office, clerical and technical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (40 employees in unit).

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	35
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	12
Ballots segregated and not counted	5

**1136-85-R:**Canadian Union of Operating Engineers & General Workers, (Applicant) v. Hopital General de Hawkesbury and District General Hospital Inc., (Respondent) v. Canadian Union of Public Employees, (Intervener).



Unit: "all lay office and clerical employees of the respondent at Hawkesbury, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except secretary to the executive director, secretary to the director of finance and personnel, the secretary of the director of nursing, supervisors and persons above the rank of supervisor." (16 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		15
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		7
Number of ballots marked in favour of intervener		2

**1151-85-R:** Canadian Union of Operating Engineers and General Workers, (Applicant) v. Halo of Canada Lighting, Inc., (Respondent) v. Teamsters Local Union No. 352, (Intervener).

Unit: "all employees of the respondent working at Mississauga, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (81 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		79
Number of persons who cast ballots	57	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		50
Number of ballots marked in favour of intervener		5

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**0849-85-R:** Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Collingwood Public Utilities Commission, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent save and except foremen, persons above the rank of foreman, office staff, students employed during the school vacation period and persons regularly employed not more than twenty-four (24) hours per week." (17 employees in unit).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant		9
Number of ballots marked in favour of intervener		7

**0874-85-R:** Ontario Public Service Employees Union, (Applicant) v. Listowel District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Elma Township, save and except office and clerical employees, supervisors, and those above the rank of supervisor." (25 employees in unit).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	20	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list		19
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		7

## Ballots segregated and not counted

1

**0897-85-R:**Canadian Union of Public Employees, (Applicant) v. Ontario Cancer Treatment and Research Foundation, (Respondent).

Unit: "all employees of the respondent in its Kingston Regional Cancer Centre, save and except supervisors, those above the rank of supervisor, professional medical staff, career scientists, physicists, student physicists, registered nurses employed in a nursing capacity, Chief Technologists, Manager of Medical Records, Administrator/Business Manager, Deputy Business Manager (Computer Co-ordinator), Lodge Supervisor, and secretary to the Centre Director." (55 employees in unit).

Number of names of persons on revised voters' list		53
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant		30
Number of ballots marked against applicant		18

**1042-85-R:**Health, Office and Professional Employees, a division of Local 206, United Food and Commercial Workers, chartered by the United Food and Commercial International Union, C.L.C.-C.I.O.-A.F.L., (Applicant) v. Regional Municipality of Peel, (Respondent).

Unit #1: "all employees of the respondent in the Vera M. Davis Community Care Centre, in Bolton, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		4

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

## Applications for Certification Dismissed - No Vote Conducted

**1461-84-R:**Retail, Wholesale and Department Store Union, (Applicant) v. Sears Canada Inc., (Respondent) v. Group of Employees, (Objectors). (83 employees in unit).

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

**1558-84-R:**Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Simmco Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, (Trade Union). (53 employees in unit).

**1861-84-R:**United Food and Commercial Workers International Union, (Applicant) v. Cara Operations Limited, (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent). (50 employees in unit).

**1862-84-R:**United Food and Commercial Workers International Union, (Applicant) v. Manuel Da Silva Foods Ltd., (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent). (50 employees in unit).

**2005-84-R:**United Food and Commercial Workers International Union, (Applicant) v. J. Paiva Foods Ltd., (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent). (65 employees in unit).

**2095-84-R:**United Food and Commercial Workers International Union, (Applicant) v. Cabral Foods Inc., (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent). (29 employees in unit).

**2121-84-R:**United Food and Commercial Workers International Union, (Applicant) v. Manuel Goncalves, Restaurateur, (c.o.b. as Swiss Chalet Bar B.Q.), (Respondent). (67 employees in unit).

**2851-84-R:**United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Superior Plumbing & Heating Co. Ltd., (Respondent) v. Group of Employees, (Objectors). (32 employees in unit).

**0197-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Commonwealth Construction Company, a division of Guy F. Atkinson Holdings Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local Union 1669, (Intervener). (24 employees in unit).

**0496-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Harnden & King Construction Ltd., (Respondent). (8 employees in unit).

**0943-85-R:**Hotel Employees Restaurant Employees Union Local 75, (Applicant) v. The Ambassador Building Maintenance Limited, (Respondent) v. Cleary Auditorium and Memorial Convention Hall, (Intervener) v. Group of Employees, (Objectors). (6 employees in unit).

### **Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote**

**0938-85-R:**Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351, (Applicant) v. Windsor Arms Hotel Limited, (Respondent) v. Food and Service Workers of Canada, (Intervener).

Unit: "all employees of the employer in the Municipality of Metropolitan Toronto, employed at the Windsor Arms Hotel, save and except supervisors and assistant supervisors, persons above the rank of supervisor, office staff, musicians, maitres d'hotel, captain waiters, chefs, sous-chefs, chefs de partie who exercise managerial functions, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and employees in bargaining units for which Local 280 of the International Beverage Dispensers and Bartenders Union of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F. of L., C.I.O., C.L.C. held bargaining rights on July 12, 1985." (110 employees in unit).

Number of names of persons on revised voters' list		110
Number of persons who cast ballots	71	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		17
Number of ballots marked in favour of intervener		50
Ballots segregated and not counted		3



**1150-85-R:**International Union, United Automobile Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Electrohome Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener #1) v. International Brotherhood of Electrical Workers Local 2345, (Intervener #2).

Unit: "all employees of Electrohome Limited at its Kitchener and Waterloo plants, save and except supervisors, chief engineers, persons above the rank of supervisors and chief engineers, security guards, sales and office staff, persons regularly employed for not more than fifteen (15) hours per week, stationary engineers and persons primarily engaged as their helpers in the boiler room, and all persons employed in the following classifications: Components Mail Order Clerk, Components Technician, Cost Reduction Technician, Draftsman, Driver Clerk, Electronics Equipment Engineer, Electronics Equipment Production Engineer, Electronics Production Engineer, Electronics Production Engineer - T.V., Small Sets, Electronics Production Engineer - Organ, Electronics Production Engineer Technician, Electronics Quality Audit Technician, Field Service Representative, Final Assembly Project Technician, Finishing Lab Technician, Industrial Engineer, Jr. Components Technician, Jr. Designer, Lab Technician, Lumber Scheduler, Mail Clerk, Maintenance Evaluator, Mechanical Draftsman, Mechanical Technician, Methods and Plant Layout Engineer, Model Maker, Model Shop Specialist, Model Shop Technician, Offset Printing Press Operator, Packaging Technician, Plant Engineering Technologist, Product Reliability Technician, Production Control Clerk, Production Control Scheduler, Production Engineering Draftsman, Production Engineering Technician, Production Scheduler, Production Schedule Planner, Quality Audit Technician, Quality Control Co-ordinator, Quality Control Inc. Insp. Techn., Quality Control Technician, Receiving Clerk, Sample Set Assembler, Service Technician, Sr. Lab Technician, Sr. Printing Clerk, Sr. Quality Audit and Equipment Technician, Standards Breakdown Technician, Standards Technician, Tool Designer, Woodworking Draftsman." (727 employees in unit).

Number of names of persons on list as originally prepared by employer	727
Number of persons who cast ballots	689
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	321
Number of ballots marked in favour of intervener #2	362

**Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**0697-85-R:**Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Jo-Mic Foods Inc. carrying on business as Poulton's Valu Mart, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town Nickel Centre in the Township of Garson, save and except assistant manager, persons above the rank of assistant manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in unit).

Number of names of persons on revised voters' list	17	19
Number of persons who cast ballots		
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		11
Ballots segregated and not counted		1

**0863-85-R:**Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. FFP Office Environments Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, those above the rank of foreman, clerical, office and sales staff, and persons regularly employed for not more than 24 hours per week." (17 employees in unit).

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	10

**1192-85-R:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant) v. Brunner Manufacturing and Sales Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (38 employees in unit).

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	37
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	20
Ballots segregated and not counted	1

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0878-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Harnden & King Construction Ltd., (Respondent).

**1105-85-R:**M.E.A. (Magnussen Employee Association) c/o Wynne Linseman, Secretary and/or Steve Norris, President, (Applicant) v. Magnussen Furniture Mfg. Co. Ltd., (Respondent).

**1205-85-R:**Ontario Nurses' Association, (Applicant) v. Richmond Nursing Home, (Respondent).

**1263-85-R:**Labourers' International Union of North America, Local 837, (Applicant) v. Capital Paving Limited, (Respondent).

**1288-85-R:**Association of Canadian Film Craftspeople, (Applicant) v. Moviecorp VII Inc., (Respondent) v. National Association of Broadcast Employees & Technicians, Local 700, (Intervener).

**1321-85-R:**Energy and Chemical Workers Union, (Applicant) v. Lansdowne Machine & Fabricating Ltd., (Respondent).

**1410-85-R:**Ironworkers District Council of Ontario, (Applicant) v. Ron Engineering and Construction (Eastern) Ltd., (Respondent).

**1440-85-R:**Canadian Union of Public Employees, (Applicant) v. Community Nursing Homes Ltd. (Port Hope, Ontario), (Respondent).

**1458-85-R:**London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Meadowcroft Place (5M Management Services Ltd.), (Respondent).

**1459-85-R:**London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Meadowcroft Place (5M Management Services Ltd.), (Respondent).

### APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1943-83-R:**Local 47, Sheet Metal Workers' International Association, (Applicant) v. R.J. Nicol Management Limited and R.J. Nicol Construction (1975) Limited, (Respondents) v. Camille's Plumbing & Heating Limited, (Intervener). (*Dismissed*).

**1457-84-R:**Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Miracle Feeds, a division of Ogilvie Mills Ltd., Idealease (London) Ltd., and 571591 Ontario Inc., (Respondents). (*Dismissed*).

**2236-84-R:**Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Zalcar Engineering and Contracting Co. Ltd. and Zalcar Engineering and Contracting Co. (1983) Ltd., (Respondents). (*Withdrawn*).

**2765-84-R:**Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Scott Mechanical Limited, Precise Cooling Limited, Van-Am Air Control Ltd., (Respondents). (*Withdrawn*).

**0321-85-R:**The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Goldfan Holdings Limited and Meadows Homes Limited, (Respondents) v. Labourers' International Union of North America, Local 183, (Intervener). (*Granted*).

**0358-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Cresson Investments Limited and/or Fairfield Management Inc. and/or Fairfield Management Limited and/or Montevideo Limited Partnership and/or Montevideo Park Ltd. Partnership and/or The South Shore Ltd. Partnership and/or Lakeview Limited Partnership and/or Glen Erin Acres Ltd. Partnership and/or 478182 Ontario Limited, (Respondents). (*Granted*).

**1250-85-R:**United Food and Commercial Workers International Union, Local 175, (Applicant) v. Giant Timber Industries Limited and Cadillac Building Products Company, (Respondents). (*Withdrawn*).



## SALE OF A BUSINESS

**2235-84-R:**Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Zalcar Engineering and Contracting Co. Ltd. and Zalcar Engineering and Contracting Co. (1983) Ltd., (Respondents). (*Withdrawn*).

**2765-84-R:**Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Scott Mechanical Limited, Precise Cooling Limited, Van-Am Air Control Ltd., (Respondents). (*Withdrawn*).

**0866-85-R:**Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Applicant) v. Service Star Building Cleaning Inc., (Respondent). (*Dismissed*).

**0990-85-R:**Canadian Union of Operating Engineers and General Workers, (Applicant) v. TDL Woodtreating Ltd., (Respondent). (*Withdrawn*).

## UNION SUCCESSOR RIGHTS

**1169-85-R:**Graphic Communications International Union, Local 701-S, London, Ontario, (Applicant) v. Lawson Business Forms, A Division of Lawson & Jones Limited, (Respondent). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**3449-84-R:**Peter Portelli, (Applicant) v. Canadian Paperworkers Union, (Respondent) v. Cooper Corrugated Containers Limited, (Intervener).

Unit: "all employees of Cooper Corrugated Containers Limited, at Rexdale, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (7 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		4
Ballots segregated and not counted		2

**3495-84-R:**June Hvalica, (Applicant) v. Service Employees' Union, Local 478, (Respondent).

Unit: "all employees of Kapuskasing & District Association for the Mentally Retarded in Kapuskasing, Ontario, save and except managers, those above the rank of manager, office staff, persons regularly employed during the school vacation period or in a co-operative training program, and persons covered by subsisting collective agreements." (7 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	7	
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent		2

Number of ballots marked against respondent 5

**3502-84-R:**Tim Smith on behalf of the Employees of Merit Paper Company, (Applicant) v. The International Woodworkers Union of America, (Respondent).

Unit: "all employees of Merit Paper and Bag Company Limited in Oshawa, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week." (15 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	14

**0345-85-R:**Gerald Dobbin, (Applicant) v. United Steelworkers of America, (Respondent) v. Clarke Roller & Rubber Limited, (Intervener).

Unit: "all employees of Clarke Roller & Rubber Limited in Mississauga at 6290 Shawson Drive, save and except (in order) assistant supervisors, supervisors, foremen and persons above the rank of assistant supervisors, part-time employees (i.e. those who regularly work less than 25 hours per week), temporary employees, students during school vacations, office and sales staff." (15 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	9

**0936-85-R:**Maurice Ostifichuck, (Applicant) v. International Union of Operating Engineers Local 796, (Respondent) v. Northern Telecom Electronics Limited, (Intervener).

Unit: "all Operating Engineers and persons primarily engaged as their helpers employed by Northern Telecom Electronics Limited in the power house at 75 Goodie Drive, Township of Nepean, save and except the Chief Operating Engineer." (8 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	8
Number of names of persons who cast ballots	8
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	8

**0983-85-R:**Sean Johnson, (Applicant) v. United Steelworkers of America, (Respondent) v. Canadian Business Machines Limited and Shearall Steel Limited, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of Canadian Business Machines Limited and Shearall Steel Limited in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (51 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	47
Number of ballots marked in favour of respondent	16
Number of ballots marked against respondent	31

**0985-85-R:** Rose St. Denis and Employees of Elias Brothers #704 Windsor, Ont., Canada, (Applicants) v. Local #75 H.E.R.E. Toronto, Ont., Canada, (Respondent) v. Elias Brothers Restaurants of Canada Ltd., (Intervener). (42 employees in unit). (*Granted*).

**1358-85-R:** The Employees of Santa Maria Foods Ltd., (Applicant) v. Commercial Workers Union, Local 486, (Respondent) v. Santa Maria Foods Limited, (Intervener). (38 employees in unit). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**1456-85-U:** Hickeson-Langs Supply Company, a Division of Oshawa Holdings Limited, (Applicant) v. Norm Durham, Merv Wieland, George Fyfe, Ronald Scott, Neil Traverse, Ray Barksey, Francis Joaquin, Ron French, Tom Pittman, Calvin Lillico, Nick Durham, Scott Preston, Mike Lutz, Bill Marcotte, Sam Scrivo, Kurt Preston, Ben Lapstra and Kirk German, (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**1365-85-U:** Silver Mountain Construction Limited, (Applicant) v. Toronto Building and Trades Council, Toronto Central Division, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States of America and Canada, International Brotherhood of Electrical Workers, Local 353, Drywall Acoustic Lathing and Insulation Local 675 of the Carpenters and Joiners of America, Local 1891 of the International Brotherhood of Painters and Allied Trades, Len Anderson, Ron Carroll, Vincent McNeil, York Lathing, Nortown Electrical Contractors and Municipal Plumbing and Heating, (Respondents). (*Withdrawn*).

**1428-85-U:** Victory Soya Mills, Division of Central Soya of Canada Limited, (Applicant) v. Local No. 1 Canadian Union of Public Employees, Mr. Bernie Oldham, et al., (Respondents). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0420-83-U:** Katherine Chung, (Complainant) v. Mon Sheong Foundation, (Respondent). (*Withdrawn*).

**2174-83-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Brytor International, (Respondent). (*Withdrawn*).

**0511-84-U:** Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Malette Lumber (1969) Limited and Gerald Brousseau, (Respondents). (*Dismissed*).



**1142-84-U:**Harold Nicholson, (Complainant) v. Canadian Paperworkers Union and its Local 528, (Respondent) v. Domtar Inc. - Packaging Group, Container Board Division, (Intervener). (*Dismissed*).

**1415-84-U:**Canadian Union of Public Employees, (Complainant) v. The Corporation of the City of Stratford, (Respondent). (*Withdrawn*).

**2135-84-U;2136-84-U;2137-84-U;2138-84-U;2209-84-U;2671-84-U:**Canadian Textile and Chemical Union, (Complainant) v. Di Marcantonio Industries Inc., (Respondent). (*Dismissed*).

**2342-84-U:**The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 27, (Complainant) v. Sparton of Canada Limited, (Respondent). (*Granted*).

**3119-84-U:**Scott Mechanical Limited, (Complainant) v. Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Joe Caricotta, (Respondents) v. Van-Am Air Control Ltd., (Intervener). (*Withdrawn*).

**3121-84-U:**Precise Cooling Limited, (Complainant) v. Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Robert Hartford, (Respondents) v. Van-Am Air Control Ltd., (Intervener). (*Withdrawn*).

**3422-84-U:**Ray Dickson, (Complainant) v. International Union, Local 124, United Automobile, Aerospace & Agricultural Implement Workers of America, (Respondent). (*Withdrawn*).

**0286-85-U:**David T. Balint, (Complainant) v. U.A.W. Local #444, (Respondent) v. Chrysler Canada Ltd., (Intervener). (*Dismissed*).

**0448-85-U:**The Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, CLC-AFL-CIO, (Complainant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent). (*Withdrawn*).

**0457-85-U:**Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Complainant) v. Scott Mechanical Limited, Precise Cooling Limited, Van-Am Air Control Ltd., (Respondents). (*Withdrawn*).

**0557-85-U:**The Southern Ontario Newspaper Guild Local 87, The Newspaper Guild, CLC-AFL-CIO, (Complainant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent). (*Withdrawn*).

**0742-85-U:**David Gauthier, (Complainant) v. Teamsters Chemical, Energy and Allied Workers Division, Local 424, (Respondent). (*Withdrawn*).

**0747-85-U:**Plant Committee of L/L 2281 of the I.A.M., (Complainant) v. Mack Canada Inc., (Respondent). (*Withdrawn*).

**0881-85-U:**Mary Noel, (Complainant) v. Coles The Book People, (Respondent). (*Dismissed*).

**0904-85-U:**United Food & Commercial Workers International Union AFL-CIO-CLC Local 1230, (Complainant) v. Sterns and Foster Canada Limited, (Respondent). (*Withdrawn*).

**0905-85-U:**Scott Larkin, (Complainant) v. United Auto Workers, and U.A.W. Local 1136, (Respondents) v. U.A.W. Local 222, (Intervener). (*Granted*).

**0959-85-U:**Ontario Nurses' Association, (Complainant) v. Richmond Nursing Home, (Respondent). (*Withdrawn*).

**0962-85-U:**Ronald C. Hansen, (Complainant) v. Canadian Union of Operating Engineers & General Workers, (Respondent). (*Withdrawn*).

**0966-85-U:**Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Complainant) v. The Architectural Metal Association, Abel Metal Products (1971) Ltd., Dundas Iron & Steel Limited, Modern Railings & Metalcraft Ltd., Pengelly Iron Works Ltd., Reimer Metal Products Ltd. and Ste-Alco Limited, (Respondents). (*Withdrawn*).

**1034-85-U:**The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. Morewood Industries Limited, (Respondent). (*Withdrawn*).

**1047-85-U:**The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. Morewood Industries Limited, (Respondent). (*Withdrawn*).

**1075-85-U:**United Steelworkers of America, (Complainant) v. Ebel Quarries Ltd., (Respondent). (*Withdrawn*).

**1076-85-U:**United Steelworkers of America, (Complainant) v. Ebel Quarries Ltd., (Respondent). (*Withdrawn*).

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*Ontario Labour Relations Board,  
400 University Avenue,  
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November 1985



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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1985] OLRB REP. NOVEMBER**

**EDITOR: NIMAL V. DISSANAYAKE**

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**1164-85-M** International Union of Operating Engineers, Local 793, Applicant, v. **Arlington Crane Service Limited**, Respondent, v. Operating Engineers Employer Bargaining Agency, Intervener

Adjournment - Constitutional Law - Construction Industry Grievance - Practice and Procedure - Remedies - Respondent applying for judicial review to have Board summons quashed and to have Board prohibited from proceeding with hearing on constitutional grounds - Board not adjourning pending disposition of court application - Board considering past breaches of collective agreement by respondent - Issuing cease and desist and compliance orders in addition to compensation

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *M. Eayrs* and *H. Kobryn*.

**APPEARANCES:** *Bernard Fishbein* and *E. A. Ford* for the applicant; *Morris Manning, Q.C.* for the respondent; *Bruce Binning* and *James Thomson* for the intervener.

**DECISION OF THE BOARD;** November 28, 1985

1. The style of cause in this matter is amended to add "Operating Engineers Employer Bargaining Agency" as an intervener.

2. This is a referral of a grievance to the Board under section 124 of the *Labour Relations Act*. The (Form 104) Referral which initiated these proceedings indicates that the matter referred to the Board for final and binding determination under that statutory provision is the applicant's "grievance dated March 6, 1985". That grievance, which was filed with the Board (as Exhibit 1) at the hearing of this matter, reads:

*(see over)*



## GRIEVANCE FORM

INTERNATIONAL UNION OF OPERATING ENGINEERS  
LOCAL 793

\*\*\*\*\*

STYLE OF GRIEVANCE ~~(a) - EMPLOYEE GRIEVANCE~~(b) UNION GRIEVANCE (Strike out (a) or (b) if  
not applicable)EMPLOYER CONCERNED: Employer Bargaining Agency and its affiliate  
Arlington Crane Service LimitedPROJECT SITE: Namasco, Heritage Road, BurlingtonTYPE OF AGREEMENT Provincial AgreementSECTION(S) OF AGREEMENT VIOLATED Master Portion, 2.2, 3.1(a),  
Schedule 'A' Article 1.6TIME PERIOD CONCERNED March 6, 1985 and continuing

\*\*\*\*\*

THIS GRIEVANCE IS FILED ON BEHALF OF Local 793, I.U.O.E. on behalf  
of its members

THE NATURE OF THE GRIEVANCE IS AS FOLLOWS:

The company are employing other than a member of Local 793  
I.U.O.E. in the capacity of a front end man contrary to  
the collective agreement.The company failed to call this Union Hall for personnel  
as required.

REMEDY REQUESTED:

That the company only employ members of Local 793, I.U.O.E.  
for the classification of front end man. That the company  
pay the amount equal to 8 hours' pay plus vacation pay,  
Pension and Welfare, Training Fund and E.R.A. Fund for all  
days worked by other than a member of this local on a 65 ton  
Grove truck crane, Licence number AY7436.

ACTION TAKEN - OR COMPANY COMMENTS:

SIGNED BY COMPANY

SIGNED BY ~~(a) - Employee~~  
(b) Union"W. Pedder"Date March 6, 1985

(Please make out in three copies)

3. At the commencement of the hearing of this matter on October 23, 1985, Mr. Manning advised the Board that on the previous day he had filed on behalf of the respondent (also referred to in this decision as "Arlington"), and Dorothy Foran, an application for judicial review, requesting the Divisional Court to quash a summons which had been served on Dorothy Foran by the applicant (also referred to in this decision as "Local 793"), and to prohibit the Board from hearing this referral, on the ground that various (unspecified) powers of the Board are of no force and effect in view of *The Constitution Act, 1982*. Since Mr. Manning chose not to elaborate on the basis of his clients' constitutional challenge to the Board's jurisdiction, we are not in a position to rule upon the validity of that challenge.

4. After hearing and recessing to consider the submissions of the parties concerning the issue of whether these proceedings should be adjourned pending disposition of that application for judicial review, the Board made the following unanimous oral ruling, which is hereby confirmed:

Counsel for the respondent has requested that these proceedings under section 124 of the *Labour Relations Act* be adjourned pending disposition by Divisional Court of an application for judicial review which was filed yesterday on behalf of the respondent. Counsel advised the Board that the respondent is seeking by means of that application to have the Court quash a Board summons which has been served by the applicant on Dorothy Foran in respect of these proceedings, and to have the Board prohibited from hearing the referral on constitutional grounds which he has not delineated before the Board and does not intend to argue in this forum. Counsel for the applicant submitted that the Board should proceed with the hearing of this matter which has already been delayed by an adjournment to which he consented as a matter of courtesy to counsel for the respondent, for whom the initial date scheduled for hearing this matter was inconvenient. Counsel for the Operating Engineers Employer Bargaining Agency took no position on the issue of whether these proceedings should be adjourned.

The courts have made it clear that the Board, as master of its own procedure, is entitled to proceed with the hearing of a matter notwithstanding a pending or anticipated application for judicial review: see, for example, *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183* (1971), 71 CLLC 14,087 (Ont. C.A.). It is also clear that the Ontario Legislature, in enacting section 124, intended to have construction industry grievance referrals under that provision dealt with expeditiously by the Board: see in this regard section 124(2), which provides that the Board "shall appoint a date for and hold a hearing within fourteen days after receipt of the referral". The fact that the grievance in question, which is dated March 6, 1985, was referred to the Board on August 8, 1985, does not eliminate the desirability of an expeditious adjudication of the grievance on its merits. In this regard, we note that it is not unusual or undesirable for a party to attempt to settle or resolve a grievance under various grievance procedure steps or by other informal means before referring it to the Board. The adjournment to

which counsel for the applicant agreed in order to convenience counsel for the respondent also does not, in our view, provide a valid basis for further adjourning these proceedings for an indefinite period of time pending final disposition of the respondent's application for judicial review.

Accordingly, having regard to all of the circumstances, including the nature of the grievance which pertains to an alleged failure by the respondent to hire through the applicant's "hiring hall", we have decided to deny the respondent's request for an adjournment and to proceed with the hearing of this matter.

5. After the Board made that ruling, counsel for the applicant stated that he would require the attendance of the persons who had been summoned to the hearing, including Dorothy Foran. Notwithstanding that statement, Dorothy Foran left the hearing room without being released by the Board from the summons which had been duly served on her by the applicant, and did not return. Following her departure, Mr. Manning advised the Board that he was withdrawing from the proceedings in his capacity as counsel for the respondent and counsel for Dorothy Foran, but that he would be remaining as counsel to the witness Michael Panter, who had also been summoned to the hearing by the applicant. In response to a query by Mr. Binning as to whether or not Mr. Manning would be challenging the validity of the Provincial Agreement in these proceedings, Mr. Manning indicated that he was remaining at the hearing only as counsel to Mr. Panter in order to protect his rights as a witness, and that he would not be making any submissions concerning any collective agreement or the Board's jurisdiction. On the basis of that information, Mr. Binning advised the Board that the Operating Engineers Bargaining Agency would be withdrawing from the hearing as it had only intervened in the proceedings for the purpose of protecting the validity of the Provincial Agreement.

6. The Board then proceeded to hear the evidence of Ernest A. Ford, the applicant's Labour Relations Manager; William Pedder, who has been employed by Local 793 as a Business Agent since 1978; Michael Panter, the aforementioned witness summoned by the applicant; and Glenn McLeod, who has been Local 793's Hamilton Area Supervisor for the past seven years. The Board also granted the applicant leave to recall Mr. Pedder in view of certain testimony by Mr. Panter which could not reasonably have been anticipated by the applicant. In addition to that oral evidence, the Board also received documentary evidence consisting of the aforementioned grievance, the Provincial Agreement, lists of members of the Crane Rental Association of Canada, lists of (unlicensed) members of the applicant, a clearance issued by the applicant to Mr. Panter on April 24, 1984, and an affidavit of service in respect of the aforementioned summons which was served on Dorothy Foran by the applicant.

7. It is clear from the evidence that the respondent is, and was at all material times, bound by the May 1, 1984 to April 30, 1986 Provincial Collective Agreement between the Operating Engineers Employer Bargaining Agency (referred to in that agreement as the "Employer") and the Operating Engineers Employee Bargaining Agency (referred to in that agreement as the "Union"), which collective agreement is referred to in this decision as the "Provincial Agreement", for ease of reference. Articles 2, 3, and 26 of the Provincial Agreement provide, in part, as follows:

## ARTICLE 2 - RECOGNITION

- 2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer for whom the Union has bargaining rights within the Province of Ontario engaged in work covered by the schedules and classifications set out in this agreement, and any additional classifications as may be agreed to by the parties.
- 2.2 The onsite operation, repair, maintenance and servicing of all equipment listed in this agreement shall be performed by a member of the Union including the assembly and dismantling of equipment operated by members of the Union and coming within the jurisdiction of the Union, boom, boom sections and counter-weight installation and removal and any other requirements necessary to put equipment into production or preparation for removal from operations. When Ironworkers are available on site they may be used to assist in the installation and removal of boom, boom sections and counterweight components. Additional assistance by other than Union members for the installation or removal of boom, boom sections and counterweight components shall only be used upon agreement with the Union.

• • • •

## ARTICLE 3 - UNION SECURITY

- 3.1 a) The Employer shall first call the Union Office whenever personnel are required. If the Union cannot supply such personnel within 48 hours, excluding Saturdays, Sundays and Holidays, the Employer may secure such personnel from any other source. The Employer may recall former regular employees through the Union office who have been absent from the Employer up to six (6) months.
- b) Regular employees shall be defined as employees who have been on the Employer's payroll for six (6) consecutive months or more.
- 3.2 All personnel hired shall be required to have a clearance card issued by the Union before they start to work, unless other arrangements are made with the Union dispatcher. Such clearance card will not be unreasonably withheld.
- 3.3 Employees working under this Agreement shall be members of the Union in good standing, or make application to become members of the Union within seven days of hiring or be replaced upon written request by the Union.

• • • •

## ARTICLE 26 - MANNING OF EQUIPMENT

- 26.1 a) The parties agree that the following formula will be used for the purpose of manning certain equipment set out in the classifications 1 and 2 of the attached Schedules, save and except Schedules "C" and "O".
- b) It is further agreed that this formula shall apply to each Employer on any one job.
- c) The following shall be manned by one (1) operator and one (1) apprentice, oiler or oiler driver.
- i) All conventional truck mounted cranes with a manufacturers rating of 25 tons capacity and over.

• • • •



- iii) All truck mounted hydraulic cranes with a manufacturers rating of 35 tons capacity and over.

• • • • •

8. “Hiring hall” provisions similar to that found in Article 3.1 of the Provincial Agreement are quite common in collective agreements in the construction industry. The significance of the hiring hall in that industry was described by the Board as follows in *Joe Portiss*, [1983] OLRB Rep. July 1160:

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls In The Maritime Industry*, Sub-Committee On Labour Management Relations Of Senate Committee On Labour and Public Welfare, 81st Cong. (2d ses. 100-01 (1950) and Bastress, *Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls* [1982] West Virginia Law Review 31). If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvass numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers ... it may engender a work force with greater experience and sophistication, which will also benefit the employer.

9. Schedule “A” to the Provincial Agreement covers and applies to various employers engaged in the crane and equipment rental business in Ontario, including the respondent. “Oiler” is one of the classifications referred to in Schedule “A”. That term, which the evidence indicates is used interchangeably in the industry with “front end man”, refers to a person who drives the “front end” of a truck mounted crane when it is being moved from place to place (as opposed to the “operator”, who operates the crane once it is in position).

10. Mr. Pedder, whom we found to be a candid and credible witness, testified that in the course of performing his functions as a Business Agent for Local 793 on March 6, 1985, he encountered Michael Panter at approximately 2:30 p.m. at the Namasco project on Heritage Road, where an addition was being built onto a factory. At the time of this encounter, Mr. Panter was standing approximately fifty feet away from a sixty-five ton Grove truck crane which had the name “Arlington” on its boom. After Mr. Panter had identified himself, Mr. Pedder asked him if he was the “front end man” on that crane. Mr. Panter replied in the affirmative, and told Mr. Pedder that he worked for Arlington on his days off from school. Mr. Pedder also asked Mr. Panter if Mr. Pedder’s brother Ron was still working for Arlington, to which Mr. Pedder replied, “Yes, he is still working in the shop.” (Shop employees are not covered by Schedule “A”).

11. Mr. Panter told the Board that he was in school on March 6, 1985 and was not on the aforementioned site. However, we prefer the evidence of Mr. Pedder concerning that matter and, accordingly, find as a fact that Mr. Panter was employed by the respondent as an oiler on the site in question on March 6, 1985. In making that finding of fact, we have taken into account the fact that Mr. Pedder made contemporaneous notes of his encounter with Mr. Panter. Mr. Panter, on the other hand, was testifying without the benefit of notes or records. When asked by applicant's counsel if he had any records of when he "front ended" for Arlington, Mr. Panter replied, "I don't carry my own records." In assessing Mr. Panter's credibility and the weight to be given to his evidence, we have also considered his demeanour while testifying and his reluctance to answer questions posed by applicant's counsel. Mr. Panter's barely audible responses to Mr. Fishbein's initial questions provide an example of that reluctance:

Counsel: Have you front ended for Arlington since March 6, 1985?

Witness: Yes.

Counsel: Where and when?

Witness: Does it matter?

Counsel: Yes.

Witness: I don't understand the question.

Mr. Panter's testimony concerning a Local 793 clearance card is also indicative of the unreliability of his memory with respect to dates. Mr. Panter initially testified that he had a Union clearance card from Local 793 for the period from April of 1985 to September of 1985. When applicant's counsel asked him if he was "sure it was in 1985", Mr. Panter said "Yes". However, after Mr. Panter had been excluded from the hearing room for a few moments at the request of counsel for the applicant, who wished to address the Board concerning the propriety of putting the witness on notice that the applicant intended to call evidence to contradict his assertion that he had been issued a clearance card in 1985, the following exchange occurred between Mr. Fishbein and Mr. Panter when the latter resumed his testimony:

Counsel: You said you had a clearance card from April of 1985 to September of 1985?

Witness: Yeah, but it was 1984.

Counsel: You had no clearance card for 1985?

Witness: No.

Counsel: When you were working in the summer of 1985, were you working without a clearance card?

Witness: Yes.

The evidence of Mr. McLeod establishes that although Mr. Panter was issued a clearance card for the period from April 24, 1984 to August 31, 1984, he did not apply for or obtain a clearance card for any period in 1985.

12. Although Mr. Panter was unable to provide the Board with the precise dates on which he worked for Arlington as an oiler during 1985, he acknowledged that he had been employed by the respondent in that classification from June of 1985 to the date of the hearing; it was his evidence that during that period he did not work every day, but sometimes worked five days a week and other times worked seven days a week. The precise dates would, of course, be ascertainable from payroll records or other documents of the type which Dorothy Foran was directed by the aforementioned summons to bring with her and produce at the hearing of this matter. However, counsel for the applicant elected not to seek enforcement of that summons at this stage of the proceedings, in recognition of the fact that production of such records could await the quantification stage of the proceedings in the event that the grievance succeeded and the parties were unable to agree on the quantum of compensation payable.

13. It is clear from the totality of the evidence that the respondent did not call the applicant's office when it required an oiler on March 6, 1985 and during the period from July 1, 1985 to October 23, 1985. It is also clear that if the respondent had called the applicant's office as it was obligated to do under Article 3.1 of the Provincial Agreement, the applicant would have been able to supply one or more oilers within forty-eight hours, as Local 793 had at all material times a number of unemployed members who were capable of working as oilers. Instead of doing so, the respondent, in contravention of Article 3 of the Provincial Agreement, employed Michael Panter, who was not referred to the job by the applicant and who did not (at any time material to the instant case) have a clearance card issued by the applicant. (The evidence also establishes that Mr. Panter is not a member of Local 793, and has never applied to become a member of Local 793.)

14. In addition to a declaration that the respondent has contravened the Provincial Agreement and a compensation order in respect of that continuing breach, the applicant seeks a compliance order. In support of that request, counsel for the applicant noted that this is not the first case in which the respondent has been found by the Board to be in contravention of the union security clause in the Provincial Agreement or its predecessors. Counsel referred the Board to several previous section 124 cases between the parties, including an unreported decision dated June 21, 1982 (in Board File No. 0338-82-M) in which another panel of the Board found that the respondent had violated Article 3.1 of the 1980-82 Provincial Agreement (which is identical to Article 3.1 of the 1984-86 Provincial Agreement, as quoted above) by hiring an individual as a trainee without first seeking a referral from the applicant; and an unreported decision dated March 25, 1983 (in Board File Nos. 2222-82-M and 2509-82-M) in which another panel of the Board found that the respondent had violated Article 3.1 of the 1982-84 Provincial Agreement (which is also identical to Article 3.1 of the 1984-86 Provincial Agreement) by employing an operator who, although he was a member in good standing of Local 793, was not hired by the respondent through Local 793's office. That decision also found that the respondent had contravened Article 3.4 of the applicable Provincial Agreement by using an owner-operator who did not have a collective agreement with the applicant. (An application for reconsideration of that decision was dismissed by that panel of the Board in an unreported decision dated May 4, 1983.) In subsequent unreported decisions dated June 24, 1983 and September 19, 1983, that panel of the Board, which in accordance with the Board's usual procedure in such matters had remained seized of the referral, directed the respondent to pay to the applicant damages totalling \$23,175.76 in lost wages and benefits for the work which would have been performed under the collective agreement but for the respondent's contravention of the union security clause.



15. In an unreported decision dated March 5, 1984 (in Board File No. 1959-83-M), yet another panel of the Board found the respondent to have contravened Article 3.4 of the 1982-84 Provincial Agreement. In considering the appropriate remedy to be granted in such circumstances, the Board wrote as follows in paragraph 11 of that decision:

The instant referral involves a substantial and continuing violation of the provisions of article 3.4. Moreover, the instant referral is similar to the referrals in Board File Nos. 2222-82-M and 2509-82-M, where the Board granted damages to the applicant. In our view, the applicant is entitled to be afforded a measure of protection against this ongoing conduct by the respondent. In *Re Samuel Cooper & Co. Ltd. and International Ladies' Garment Workers' Union et al.* (1973), 35 D.L.R. (3d) 501, the Divisional Court upheld the power of an arbitrator to make affirmative directions, in the nature of mandatory injunctions, as are necessary to effect compliance with a collective agreement. At pages 505-6, Lacourciere, J. stated:

We are all satisfied on the record that the arbitrator correctly concluded after hearing evidence that any and all conditions precedent to the hearing of the grievance had been satisfied, that art. 32(b) was directory. The only course open to him to bring in a final and binding settlement by arbitration of the differences between the parties involved the making of affirmative directions. With respect to the arbitrator's power to take such affirmative action, this Court has been referred to the language of s. 37(1) of the *Labour Relations Act*, R.S.O. 1970, c. 232, which reads:

37(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any questions as to whether a matter is arbitrable.

We have also been referred to the following cases: *Re Amalgamated Electric Corp. and United Electrical, Radio & Machine Workers of America, Local 514* (1950), 2 L.A.C. 597; *Beswick v. Beswick*, [1967] 2 All E.R. 1197; *Hodder v. Turvey* (1873), 20 Gr. 63; *Re Ruppert*, 34 Labour Cases para. 71,243. It appears that the special tribunals created by unions and employers, and directed by statute to bring about final and binding settlement of all differences, ought to have the necessary powers to achieve such results.

The majority award in the *Amalgamated Electric Corp.* case was given in May, 1950, by Bora Laskin and C. L. Dubin (now Laskin, J., and Dubin, J.A.) as members of a board of arbitration, whose authority to award compensation was challenged because of the difficulty in the enforcement. The following comments made in the majority award at p. 602 are equally applicable here:

As a matter of principle, and in the light of the terms of the Agreement, this Board is of the opinion that its power to make a binding decision involves powers to direct such affirmative action as would remedy the breach declared to exist. A declaration or finding divorced from a direction for its implementation does not, in this Board's view, meet the requirements of a binding decision. A decision is binding when it requires the doing or not doing of something by the defaulting party, related to the default of which it is guilty and intended as a remedy for such default. In so far as a declaration carries no obligation of compliance in relation to the specific case, it cannot be a binding decision.

In our opinion, the jurisdiction of the arbitrator was sufficiently wide to encompass a full range of remedy, unless expressly limited by the *Labour Relations Act* or the terms of the collective agreement. I can find no such limitation and the wording of s. 37(1) of the Act is such that the arbitrator was correct in this particular case in making the orders provided.



Section 44(1) [formerly section 37(1)] of the *Labour Relations Act* remains unchanged. Moreover, section 124(1) also provides:

Notwithstanding the grievance and arbitration provisions of a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

In addition, article 7 of the provincial collective agreement provides that decisions of the board of arbitration or a majority of such board shall be binding on the parties to the agreement.

16. Similar reasoning applies to the present case, which involves a further continuing breach of the union security clause contained in the Provincial Agreement. Accordingly, the Board's determination in this matter will include an order directing the respondent to cease and desist from violating the union security clause, directing it to first call the applicant's office whenever personnel are required to perform work covered by the Provincial Agreement or Schedule "A" thereto, and directing the respondent not to secure such personnel from any other source unless the applicant cannot supply such personnel within forty-eight hours (excluding Saturdays, Sundays, and holidays).

17. The appropriate remedy in the instant case also includes an award of compensation framed in accordance with the principles referred to in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 57 D.L.R. (3d) 199 (Ont. C.A.), leave of appeal to the S.C.C. refused November 17, 1975. (See also *Reimer Overhead Doors Ltd.*, [1984] OLRB Rep. Oct. 1493; *Re McKenna Brothers Ltd. and Plumbers Union, Local 527* (1975), 10 L.A.C. (2d) 273; and paragraph 5 of the Board's aforementioned decision dated June 24, 1983 (in File Nos. 2222-82-M and 2509-82-M).) Those principles recognize that an employer's breach of a union security clause of the type contained in Article 3 of the Provincial Agreement deprives union members of wages and benefits which would have been paid to them (or to the union on their behalf) if the employer had complied with its obligation to call the union office whenever personnel covered by the agreement were required. Accordingly, the appropriate way to (insofar as is possible) place the injured parties in the position they would have been in if the Provincial Agreement had not been violated is to direct the respondent to pay to the applicant in trust (for distribution to its member or members who were wrongfully denied an opportunity to work for the respondent, and to the applicable plans) the wages, vacation pay, benefit plan payments, pension plan payments, and other remittances which should have been paid by the respondent in respect of the work which it used Mr. Panter to perform, in contravention of the Provincial Agreement.

18. For the foregoing reasons, the Board, pursuant to section 124 of the *Labour Relations Act*, hereby makes the following determination:

- (1) The respondent has violated Article 3 of the (1984-1986) Provincial Collective Agreement between the Operating Engineers Bargaining Agency and the Operating Engineers Employee Bargaining Agency (the "Provincial Agreement"), by employing Michael Panter as an oiler on March 6, 1985, and during the period from July 1, 1985 to the date of this determination;

- (2) the respondent shall forthwith pay to the applicant in trust (for distribution to its member or members who, as a result of the respondent's contravention of Article 3 of the Provincial Agreement, were wrongfully denied an opportunity to work for the respondent as oilers, and to the applicable plans) the wages, vacation pay, benefit plan payments, pension plan payments, and other remittances which should have been paid by the respondent in respect of that work; and
- (3) the respondent shall cease and desist from violating Article 3 of the Provincial Agreement, and shall first call the applicant's office whenever personnel are required to perform work covered by the Provincial Agreement or Schedule "A" thereto, and shall not secure such personnel from any other source unless the applicant cannot supply such personnel within forty-eight hours (excluding Saturdays, Sundays and Holidays).

19. The Board will remain seized of this matter in the event that a dispute arises concerning the implementation or quantification of the Board's order. (For an exposition of the policy reasons for which the Board, as master of its own procedures, has generally adopted this procedure, which affords the parties an opportunity to agree upon the amount to be paid in cases in which the Board awards compensation, see *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449, at paragraph 31.)

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**1796-85-R** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicants, v. **Brick Brewing Co. Limited**, Respondent, v. Group of Employees, Objectors

**Build-Up - Certification - Existing employees amounting to precisely 50% of anticipated workforce - Whether build-up principle applicable - Whether sufficiently representative**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *P. Grasso*.

**APPEARANCES:** *Archie Duckworth*, *Perry Witt* and *Mike Ostner* for the applicants; *Ian S. Campbell* and *James R. Brickman* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD;** November 14, 1985

1. This is an application for certification.

2. Prior to the scheduled hearing of this matter, the parties met with a Labour Relations Officer at which time the parties reviewed and agreed on all but one of the issues raised in this application.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that:

all employees of the respondent in Waterloo save and except supervisors, persons above the rank of supervisor, office and sales staff, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, hereinafter referred to as bargaining unit #1; and

all employees of the respondent in Waterloo regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff, hereinafter referred to as bargaining unit #2,

constitute two units of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in each bargaining unit, at the time the application was made, were members of the applicant on October 29, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. Counsel for the respondent submitted that this was an appropriate case for the Board to exercise its discretion and order a representation vote among the employees in each of the bargaining units after the build-up of the respondent's employee complement was completed, in February 1986. Some of the facts relevant to the issue of build-up were agreed to by the parties, while others were disputed by the applicant. Counsel for the respondent adduced evidence relating to the relevant facts that were in dispute. After receiving the evidence, the Board heard the submissions of the parties, following which it recessed and then returned to deliver the following decision orally:

In this application for certification, counsel for the respondent submits that the Board should exercise its discretion to order a representation vote because there will be a build-up of the employee complement.

The parties agreed and the Board found that two units of employees were appropriate for collective bargaining, a full-time unit and part-time unit. At the time of the application, there were six employees in the full-time bargaining unit and ten employees in the part-time bargaining unit. Five of the six full-time employees and seven of the ten part-time employees were members of the applicant as of the terminal date.

The respondent's submission requires the Board to balance the

rights of the current employees with those of the future employees that will be hired by the respondent. Generally, the Board will exercise its discretion to order a vote in a build-up situation where

“... there [is] a firm plan for an imminent build-up. (See *Power Controls*, [1967] OLRB Rep. March 954, *Cameron Packing Inc.*, [1972] OLRB Rep. Nov. 988, and *Canron* [1969] OLRB Rep. Sept. 750.) As well, the actualization of the build-up must be relatively certain. It should not, in other words, be dependent on market factors well beyond the control of the employer. In *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829, for example, the Board ruled that the planned build-up was not sufficiently firm to delay the vote because the build-up was almost totally dependent on the unstable market conditions in which the respondent’s industry was engaged. The Board made a similar ruling in *Cameron Packaging Inc.*, (*supra*), where the projected build-up was dependent on the next years’ market and competitive conditions.”

(*F. Lepper & Sons Limited*, [1977] OLRB Rep. Dec. 846 at 847-848.)

We are convinced that the respondent will increase its complement of employees by six additional employees in the full-time unit and six additional employees in the part-time unit within the next three months, as was submitted by counsel for the respondent.

However, before ordering a representation vote as a result of a build-up of employees, the Board must be satisfied that the number of employees in the bargaining unit at the time the application was made is *not* representative of the work force that will be employed after the build-up has been completed. As the Board stated in the *F. Lepper & Son Limited* case, *supra*, at 848:

“... to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If less than fifty per cent of the expected total are then employed, it is normally felt that the group is not sufficiently representative and that the application is therefore premature (see *B. F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693.)”

It is clear to us that in respect of the part-time bargaining unit, well over fifty per cent of the anticipated number of employees were employed in the bargaining unit on the application date. Those employees are representative of the anticipated work force that will be in place after the build-up.

However, in the full-time bargaining unit, precisely fifty per cent of the anticipated work force were employed in the bargaining unit as of the application date. The Board notes that all of the job classifications that the respondent will utilize after the build-up have at least one employee in them.

In our view, the respondent’s current work force in the full-time bargaining unit is representative of the anticipated work force after the build-up is completed. We adopt the approach of the Board in *Marley*



*Roof Tiles*, [1984] OLRB Rep. March 511, referred to in *Woodbridge Foam Corporation*, [1985] OLRB Rep. Jan. 139, where the Board in the *Marley Roof Tiles* case stated at page 514:

“As indicated in the above excerpt from the *F. Lepper & Son Limited* case, the Board generally takes the position that a group of employees is sufficiently representative if it includes fifty per cent of the expected total number of employees. In the instance case, the fifty per cent point is projected to be reached at some point during the month of March, 1984 when the respondent hires the twentieth bargaining unit employee. Accordingly, if the Board were to follow its normal practice, it would consider the wishes of a majority of employees at that point in March when twenty employees were employed in the bargaining unit. Generally, this would be done by way of a representation vote. Given the facts of this case, however, we are satisfied that no such vote is required. Presumably, of the twenty bargaining unit employees projected to be employed in March, fifteen of them will be the same employees who are in the bargaining unit on the application date. All of these fifteen employees are members of the applicant. Accordingly, even when half the total projected number of the employees are employed in the bargaining unit, it appears reasonable to conclude that over fifty-five per cent of them will be members of the applicant union. In these circumstances, we believe the current employees to be sufficiently representative for the purposes of this application. Accordingly, we are not prepared to direct the taking of a representation vote or to postpone certification of the applicant.”

In this case, five of the six employees, who comprise fifty per cent of the anticipated work force in the full-time bargaining unit, are members of the applicant. Therefore, in balancing the rights of the current employees and the rights of future employees, we are satisfied that because the employees in each of the bargaining units are representative of the anticipated number of employees that will be employed in those bargaining units after the build-up, we decline to order a representation vote.

Certificates will issue to the applicant in respect of each of the bargaining units.

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**1570-85-R** The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, Applicant, v. **Centrestage Toronto**, Respondent

**Bargaining Unit - Practice and Procedure - Appropriate unit description for stage employees - Whether Board accepting agreement of parties - Whether unit including all stage employees or existing classifications only**

**BEFORE:** *R. A. Furness*, Vice-Chairman, and Board Members *B. L. Armstrong* and *R. J. Gallivan*.

**APPEARANCES:** *T. W. Pratt* and *J. C. Fuller* for the applicant; *W. G. Phelps*, *Edgar Dobie* and *Ivan Habel* for the respondent.

**DECISION OF THE BOARD;** November 25, 1985

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

2. The applicant has applied for certification with respect to a bargaining unit defined as “stage carpenters, stage electricians and property men employed by the respondent in the Municipality of Metropolitan Toronto”. The respondent in its reply has suggested that the appropriate bargaining unit ought to be defined as “all stage carpenters employed by the respondent at its scenery construction shop, 9 Hanna Avenue in the Municipality of Metropolitan Toronto”. Prior to the hearing of this application, the parties notified the Board that the appropriate bargaining unit ought to be described as “stage carpenters and stage electricians employed by the respondent at its scenery construction shop at 9 Hanna Avenue in the Municipality of Metropolitan Toronto”. Although the parties were prepared to waive a hearing of this application, a hearing was held so that the Board could obtain further information on the extent of the respondent’s operation and on the appropriateness of the bargaining unit which reflected their agreement.

3. The respondent is a theatre production company and is the successor to the Toronto Arts Productions. It is run by a board of directors as a non-profit unincorporated organization and is a charity under the *Income Tax Act*. The respondent puts shows together, hires actors, builds scenery and stages shows. These shows are staged at the St. Lawrence Centre. When a show is running at the St. Lawrence Centre the stage hands required to run the show are employed by the St. Lawrence Centre under a collective agreement between the St. Lawrence Centre and the applicant. In the event that set scenery is constructed in the St. Lawrence Centre, such scenery is constructed under the collective agreement between the St. Lawrence Centre and the applicant.

4. The set construction, which is affected by this application, is not constructed at the St. Lawrence Centre but is constructed at the respondent’s comparatively new scenery construction shop at 9 Hanna Avenue (the “first location”) which is near the Canadian National Exhibition. On September 25, 1985, the date of the filing of this application, the respondent employed five stage carpenters at the first location who had been hired through the hiring hall of the applicant in order to construct scenery. At the material time, the respondent did not employ stage electricians. However, the respondent conceded that it is possible that there may be the occasional future requirement for a stage electrician at the first location. The respondent also has an additional location at 39 Niagara Street in the City of Toronto (the “second location”). At the second location the respondent employs up to seven property men. On September 25, 1985, the respondent employed four property men at the second location. The property men were not hired through the applicant’s hiring hall.

5. The work at the two locations requires the exercise of different skills. The first location is a scenery fabrication shop, while the work at the second location involves the building and the maintaining of movables (props). The respondent also employed at the material time about twenty wardrobe personnel at several locations, including the St. Lawrence Centre where the respondent rents space. None of the wardrobe personnel work at either the first or second locations. The property men and wardrobe personnel are employed on a seasonal basis from the beginning of September to the end of May of each year. The respondent has leased what it described as “a fair amount of space” at the first location. The respondent is not bound by any collective agreements.

6. The Board discussed with the parties the scope and location of the appropriate bargaining unit. The applicant informed the Board that it has never represented, has never sought to represent wardrobe personnel and that the applicant does not take them into membership. However, the applicant informed the Board that it does take property men into membership and does represent them under the terms of its various collective agreements. It was the position of the applicant that wardrobe personnel were taken into membership and represented by its sister local 822 in the same way that another sister local 873 represented motion picture mechanics.

7. The respondent argued that a bargaining unit of all stage employees at the first location would be too restrictive because if the respondent was required to consolidate its operations at the first location a bargaining unit of all stage employees would be a substantial impediment to accomplishing this. The respondent pointed out that in the unlikely event that it did move from the first location, such a move could be dealt with in collective bargaining because it had obtained the stage carpenters from the applicant. As an alternative description to the bargaining unit proposed by both parties, the respondent suggested that the appropriate bargaining unit might be described as "stage carpenters, stage electricians employed by the respondent in the scenery construction shop" with a clarity note that at the time of the application the shop was at 9 Hanna Avenue and a further clarity note that property men and wardrobe attendants are not included in the bargaining unit.

8. The applicant has rarely used the Board's certification procedures in obtaining its bargaining rights. In *Harbourfront Corporation*, [1982] OLRB Rep. Nov. 1624, the Board entertained an application for certification by the applicant wherein the applicant had applied for certification for an alleged craft bargaining unit of employees described as "all stage employees, theatre technicians, audio-visual technicians and equipment operators, stage hands and stage electricians employed by the respondent at its premises in Toronto". The employees for whom the applicant sought certification were the employees who were involved in the audio-visual aspects and the staging of the performing arts. Harbourfront also had employees in its communications, property and administration and planning and development divisions. The Board in *Harbourfront Corporation* considered the collective bargaining relationship to which the applicant was a party and stated at pages 1632 and 1633:

32. The applicant filed a number of collective agreements. These collective agreements were between the applicant and the following employers:

1. Hart House
2. Massey Hall
3. The Canadian Broadcasting Corporation
4. Ed Mirvish Enterprises Limited operating the Royal Alexandra Theatre
5. Maple Leaf Gardens
6. O'Keefe Centre
7. The Canadian National Exhibition
8. The Board of Management of The St. Lawrence Centre for the Arts, and
9. CP Hotels Limited operating The Royal York Hotel.

33. The classifications referred to in these collective agreements cover a wide variety of jobs such as, electricians, carpenters, special operators, flymen, stagehands, switchboard operators, follow spot operators and house sound systems, property men, front light operators, public address operators, portable switchboard operators, chief sound technicians, chief grips, property masters, operators and assistants, spotlight operators, superintendents of construction



of stage settings and soundmen. The descriptions in the bargaining units in these collective agreements also vary, with the terse “all stage employees” for the collective agreement between the applicant and CP Hotels Limited operating The Royal York Hotel and “electricians, carpenters, special operators and flymen” for the collective agreement between the applicant and Hart House. On the other hand, the collective agreements between the applicant and Maple Leaf Gardens and between the applicant and The Canadian National Exhibition set forth the classifications of employees in considerable detail.

34. All of the classifications referred to in the preceding paragraph are not present in each of these collective agreements. No doubt this is a function of the productions and art forms which are variously produced by or for the employers who are parties to these collective agreements. Typically, the areas of craft trade unionism which the Board encounters are mainly in the construction industry and to a lesser extent in the printing and allied trades industry. The description of the craft bargaining units in the construction industry tends to follow a repetitive pattern with very little variation, such as, for example, millwrights and millwrights’ apprentices or electricians and electricians’ apprentices. In the printing and allied trades industry the craft bargaining units do not always follow repetitive patterns with very little variation and show more variations in the composition of the bargaining units than in the construction industry. While the construction industry and the printing and allied trades industry are by far the largest groupings of craft trade unionism which generally fall within provincial jurisdiction, there are nevertheless other small pockets of craft trade unionism such as, for example, butcher workmen, stationary engineers, fur workers and bar employees. The Board has generally had little contact with the applicant which asserted its claim to the status of a craft trade union. The respondent did not dispute that the applicant is a craft trade union. On the basis of the evidence and representations before it, the Board finds that the applicant is a craft trade union as contemplated by the provisions of section 6(3) of the Act. The question of whether the applicant is entitled to be certified by the Board for the bargaining unit referred to in paragraph ten depends upon whether the applicant is able to establish that all of the conditions set forth in section 6(3) have been met in the circumstances of this application.

The Board proceeded to determine that all of the conditions set forth in section 6(3) had been satisfied and that pursuant to section 6(3) the appropriate bargaining unit was “all stage employees of the respondent in Metropolitan Toronto, save and except managers, persons above the rank of manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period”. The Board added a clarity note that “the bargaining unit presently consists of audio-visual technicians”. The Board also noted in the decision that in the event that the respondent subsequently employed other stage employees, then such employees might form an accretion to the bargaining unit.

9. In the instant application the applicant initially applied for a bargaining unit described as “stage carpenters, stage electricians and property men employed by the respondent in the Municipality of Metropolitan Toronto”. This proposed bargaining unit includes the existing property men and the non-existing stage electricians and defines the bargaining unit with respect to a municipality. The bargaining unit initially described by the respondent as “all stage carpenters employed by the respondent at its scenery construction shop, 9 Hanna Avenue in the Municipality of Metropolitan Toronto” does not include either the non-existing stage electricians or the existing property men. Moreover, this proposed bargaining unit is defined with reference to a municipal address rather than a municipality. The proposed bargaining unit which has been agreed to by the parties has been defined as “all stage carpenters and stage electricians employed by the respondent at its scenery construction shop, 9 Hanna Avenue in the Municipality of Metropolitan Toronto”. This proposed bargaining unit includes the non-existing stage electricians, excludes the existing property men and has defined the proposed bargaining unit with reference to a municipal address rather than a municipality.

10. While the Board decided in *Harbourfront Corporation* that the applicant satisfies the



requirements of section 6(3), the bargaining units described in its various collective agreements do not show any uniformity. The classifications contained in the suggested bargaining units referred to in paragraph nine parallel the diversity of the bargaining units referred to in the excerpt from *Harbourfront Corporation* in paragraph eight. In *Harbourfront Corporation* the Board contemplated a situation where it was determined to be appropriate to define an appropriate craft bargaining unit which was reflected in some of the applicant's bargaining units and which would at the same time provide a description which was broadly defined so as to include by accretion any additional classifications which might be subsequently employed in a variety of employment situations which came within the jurisdiction of the applicant.

11. It is the usual practice of the Board to define an appropriate bargaining unit with reference to the municipality where an employer's place of business is located rather than with reference to a municipal address unless the employer has more than one place of business within a municipality. The Board set forth its policy in *T.R.S. Food Services Limited*, [1980] OLRB Rep. April 542, where it stated at pages 542-543:

Where an employer has only one location within a municipality, the Board's consistent practice, apart from the construction industry, has been to describe the geographic scope of the bargaining unit by reference to the municipality rather than the respondent's particular location. This practice results from a balancing of two competing interests: the individual's interest preserved by section 3 of the Act to be free to join a trade union of his own choice, on the one hand, and, on the other, the concern of the Board as well as the union and employees involved in any particular case that sufficient stability adhere to the bargaining rights conferred....

While limiting a bargaining unit to the respondent's particular location would give considerable latitude to an individual's freedom to join a trade union of his own choice, it could, at the same [time], jeopardize the stability of the bargaining rights conferred upon the union. If an employer moves the location of its operation in a situation where the bargaining unit has been defined by reference to the employer's street address, the union's bargaining rights may be extinguished by the move. The Board's general policy of describing the geographic scope of a bargaining unit by reference to the municipality in which the employer's operation is situated instead of the particular location inhibits bargaining rights from being disturbed in this manner.

Where an employer has business operations at more than one location within a municipality, the Board's policy is to define the appropriate bargaining unit for each location unless the operations are integrated and the employees share a community of interest. In the instant case, the respondent's operations at the first and second locations do not appear to be integrated. The respondent, however, may in the future consolidate its operations at the first location.

12. From the information before the Board it appears that the wardrobe personnel and property men do not share a community of interest with each other. Neither the wardrobe personnel nor the property men work with the stage carpenters. Moreover, while the property men are normally represented in collective bargaining by the applicant, the wardrobe attendants are usually represented by a sister local of the applicant. The membership evidence which has been filed by the applicant is confined to the stage carpenters which it has supplied to the respondent. There is nothing before the Board to indicate that the applicant has made any attempt to sign any of the property men into membership. The operations of the respondent appear to be separated not only by location but also by function. The stage carpenters work at the first location and are the only employees of the respondent at the first location who fall within the jurisdiction of the applicant. The Board notes that the applicant and the respondent

have agreed that the appropriate bargaining unit ought to be described with reference to the first location. In these circumstances, the Board is prepared to define the appropriate bargaining unit in terms of the first location only.

13. The description of the appropriate bargaining unit poses an issue of whether to define the appropriate bargaining unit in terms of (a) one classification (stage carpenters), (b) one existing classification (stage carpenters) and one non-existing classification (stage electrician) or (c) all stage employees which would include stage carpenters who are presently employed and by accretion other stage employees who may be subsequently employed at the first location, for example, stage electrician and property men. In our opinion, the latter option is the preferred resolution on the facts of this application. The latter option addresses and covers the present employment situation in a craft bargaining unit context and allows for the inclusion of other members of the craft who may be subsequently employed at the first location. With the latter option, the property men are not included in the bargaining unit unless they are moved to the first location. The respondent will not be faced with a substantial impediment unless it either moves the property men to the first location or the applicant successfully organizes the property men at the second location. In either situation, the respondent will be required to bargain collectively with respect to the property men.

14. Having regard to the foregoing, the Board further finds that all stage employees in the employ of the respondent at 9 Hanna Avenue in Metropolitan Toronto, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. A certificate will issue to the applicant.

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**0953-84-M** The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, Applicant, v. **City Plumbing (Kitchener) Limited**, Respondent

Abandonment - Collective Agreement - Construction Industry - Construction Industry Grievance - Whether employees signing document knew it was a collective agreement - Whether difference in employer name on document of significance - Whether fact that document had expired at time of signing affecting binding nature - Whether bargaining rights abandoned - Whether union estopped

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *J. D. Bell* and *P. J. O'Keeffe*.

**APPEARANCES:** *Stanley Simpson* and *Jack Porter* for the applicant; *Gary P. McNeil* and *Terence J. Billo* for the respondent.

**DECISION OF THE BOARD;** November 14, 1985

1. The applicant has referred a grievance in the construction industry concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The applicant, the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 ("Local 527") made this referral on July 9th, 1984. The referral states that the grievance was delivered to City Plumbing & Heating Service on June 11th, 1984. The grievance is in the form of a letter from the solicitor for Local 527 and dated June 11th, 1984. The second and third paragraphs of the grievance read as follows:

Pursuant to instructions received, please consider this as a grievance filed by the union under a provincial agreement between the union and the Mechanical Contractors Association of Ontario by which you are bound through agreement with respect to the 1978-1980 agreement.

• • •

On behalf of the union, please consider this as a grievance pursuant to the grievance procedure set out in the provincial collective agreement.

• • •

The referral names City Plumbing & Heating Service as the respondent. A reply to the referral was duly filed with the Board. It states that the correct name of the respondent is City Plumbing (Kitchener) Limited. Since counsel for Local 527 did not take issue with that assertion when it was repeated at the outset of the hearing by respondent counsel, who also asserted that the respondent was incorporated June 18, 1980, the name: City Plumbing & Heating Service in the style of cause of the referral is hereby amended to read: "City Plumbing (Kitchener) Limited". The reply further states, in part, that:

(a) The Respondent states that the Board has no jurisdiction in this matter because



the Respondent is not a party to a collective agreement nor is it bound by a collective agreement with the Respondent;

(b) The Respondent states that it did not execute a collective agreement with the Applicant;

(c) The Respondent states that in the alternative, should the Board find that it is bound by a collective agreement, the Applicant has abandoned its rights under this collective agreement vis-a-vis, the Respondent;

(d) The Respondent further states that if it is bound by a collective agreement with the Applicant, the Applicant is estopped by its conduct from pursuing its rights under any collective agreement.

3. When the referral came on for hearing on July 23rd, 1984, counsel for the respondent reiterated those statements. They raise three issues: whether the respondent is or was bound to a collective agreement together with Local 527; if the respondent has been bound, whether Local 527 has abandoned its bargaining rights; and, if the respondent and Local 527 are bound to a collective agreement, whether Local 527 should be estopped from asserting any rights under the agreement. At least the first two of those issues go to the Board's jurisdiction to hear the grievance. After receiving the submissions of the parties as to how it should proceed in light of these issues, the Board ruled that it would hear the parties' evidence and submissions with respect to all three. When the hearing was adjourned at the end of the day, Local 527 had not completed the calling of its evidence and, after consulting with the parties, the Board scheduled the matter for continuation of hearing on October 22nd, 1984. Subsequently, that date was rescheduled to November 22nd on consent of the parties. The ill-health of a board member prevented the matter from proceeding on November 22nd and, after further consultation with the parties in December 1984, it was scheduled for continuation of hearing on April 24th, 1985. That hearing proceeded as scheduled and, while the parties completed the calling of evidence, it was necessary to schedule a further hearing to receive the submissions of the parties as to the conclusion the Board should reach on the evidence. After consultation with the parties at the hearing, the matter was scheduled for continuation of hearing on July 9th, 1985, at which time the hearing into the preliminary matters was concluded.

4. Gary McNeil is the president and sole shareholder of City Plumbing (Kitchener) Limited ("City"). He formed City after deciding in April or May, 1980 to go into business for himself. He had been a member of Local 527 since 1968 and in April 1980 he was laid off after working approximately one and a half years with the same contractor. He made his decision to start his own business shortly after his lay-off. He started his business under the name of City Plumbing & Heating Service and, as noted above, incorporated the business in June 1980 in the name of City Plumbing (Kitchener) Limited. Throughout the time that he has operated the business, however, his trucks and vans have borne the name "City Plumbing & Heating Service", on their sides. "City" is in very large lettering relative to "Plumbing & Heating Service". A photograph which was placed in evidence through McNeil shows this clearly. If the corporate name appears on the vehicle, it is not evident in the photograph.

5. Some time in October 1980 McNeil went to the offices of Local 527. While he was there he signed what he called a "paper". That paper is the source of Local 527's claim that the respondent is bound to the plumbers provincial agreement to which Local 527 is also bound. McNeil's account of what took place in the union office and the accounts of the representatives of Local 527 differ on some critical points.



6. McNeil told the Board in his examination-in-chief that he became concerned about the possibility of losing his union pension after he started his business. He went to the office of Local 527 to speak with its business manager, Jack Porter. McNeil states that he told Porter he wanted to drop his union membership but did not want to lose his pension. Porter's response was that McNeil had three choices. He could quit the union, he could take out a withdrawal card or he could continue to pay his dues to Local 527 and remit contributions for his benefits and pension for 144 hours of work per year. McNeil claims Porter told him that, if he wanted to act to preserve his pension, he would have to sign a paper which Porter produced and McNeil signed. Porter took the paper to a secretary in the office who typed the name "Kitchener Plumbing and Heating Services" and the address of the respondent in the space provided above McNeil's signature. She inserted the paper with other pages of paper and handed the assembled papers to McNeil. She also gave him some blank forms for remitting contributions to pension and welfare funds along with some sheets of paper with wages and other information on them. McNeil left the office and went to his truck where he looked through the papers which he had been given. He told the Board that he had not seen any collective agreement before he signed the piece of paper and if he had known what he was signing or the implications of what he had signed, he would not have signed it. He said that he did not seek any advice after signing the paper. He further stated that the only reason why he would sign a collective agreement would be if he wanted to be a union contractor in which case he would have gone to a lawyer for advice. The only reason he signed anything was to protect his pension and he would not have signed if he had known that he was signing a collective agreement. When he went through the papers in his truck and realized that he had signed a collective agreement, he thought it would only last for three years because that's what he was accustomed to as an employee of contractors. In earlier testimony-in-chief, McNeil had told the Board that he thought the agreements which he had worked under as an employee of contractors had been negotiated every couple of years between the contractors and the union.

7. In cross-examination, McNeil testified that he had decided to leave the union when he started his own business in April 1980. He began by doing some repair work. Then, in October 1980, he went to the union office to see what would happen to his pension if he did leave. He knew if he needed to remit contributions for 144 hours of work per year in order to retain his pension, he would have to sign something, but he did not realize what it was he was signing. It was only after he received the full set of pages that he realized he had signed a collective agreement. He did not do anything to revoke what he had signed and decided that he had bound City and would be bound for two years. During that time he knew that he would have to abide by the agreement, but after the end of two years he thought that the union would have to approach him to sign another one if his company was to be bound any longer.

8. Porter's evidence was that McNeil came to see him at Local 527's office in October 1980. McNeil told Porter that he had formed his own company and wanted to be a union contractor. He told Porter that he would call the Local if he needed any workers. McNeil also asked Porter about his union status and his benefits. According to Porter, McNeil wanted to remain a member of the union in good standing. Porter claims that he had two copies of the 1978-1980 plumbers provincial agreement. The signing page of the agreement was taken out to have the name of McNeil's company typed on it and McNeil was given a page to sign. He was also given a copy of the agreement for himself. The reason the 1978-80 provincial agreement was used was because Local 527 had not received printed copies of the newly

negotiated 1980-82 provincial agreement. McNeil was also given a "spread sheet" showing the new monetary conditions for the 1980-82 provincial agreement.

9. Thomas Crystal, Business Agent of Local 527 testified that he was in the room at the union office when McNeil signed the 1978-80 agreement. He could not say whether McNeil signed one or two agreements or whether the signing page was separate from or in the agreement when McNeil signed. He further testified that there were two agreements and the signing pages were taken out in order to type the information with respect to the respondent and then put back in the presence of everyone. McNeil did not ask any questions about what he was signing and there was no discussion about whether his signing of the 1978-80 provincial agreement would bind him to future ones. Crystal thought that McNeil would have been given blank remittance forms and sheets showing the new rates of wages and benefits to apply under the 1980-82 provincial agreement because that was the union's normal practice.

10. The page which McNeil signed bears at the top, left hand margin, the title "CONCLUSION" under which the following text appears:

In witness whereof each of the parties hereto has caused this Agreement to be signed by its duly authorized representatives as of the day and year first above written.

Under that text, at the left hand margin and in two lines of type the heading "SIGNED ON BEHALF OF THE CONTRACTOR" appears. Opposite that at the right hand margin in two lines of type, the heading "SIGNED ON BEHALF OF THE UNITED ASSOCIATION LOCAL 527" appears. Under the contractor heading, provision is made for setting out the name, address and telephone number of the signing party. On the document in evidence, the name "City Plumbing and Heating Service", the address and telephone number of City have been typed in. McNeil's signature appears under that information. On the right hand side under the signature heading for Local 527, Jack Porter has signed as business manager and Thomas Crystal has signed as business agent. In the lower left corner of the page the words are printed "Affix Contractor's Seal Here". No seal has been used in this instance. The agreement is styled as the "Ontario Provincial Collective Agreement" between The Mechanical Contractors Association Ontario and The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. Under the heading "DURATION OF AGREEMENT" the following words appear:

This Agreement shall be effective from *June 15, 1978 and shall remain in effect until the 30th day of April, 1980* and thereafter from year to year unless it is terminated by either party giving to the other party written notice that the Agreement shall be amended or terminated on the 30th day of April, 1980.

In Article 2 - Recognition, of the agreement, the Association recognizes the Council as the sole collective bargaining agent for journeymen and apprentice plumbers, steamfitters, pipefitters and welders employed by employers performing mechanical work in the industrial, commercial and institutional (ICI) sector of the construction industry under the terms of the agreement. The Council in turn recognizes the Association as the sole collective bargaining agent for all employers performing mechanical work in the ICI sector of the construction industry under the terms of the agreement.

11. McNeil had one earlier experience signing a collective agreement. In or about May

1975 he formed a partnership with another member of Local 527 to do repair plumbing. Approximately one month later, on behalf of the partnership, he signed a collective agreement which on its face was effective from May 26, 1975 to April 30, 1977. The parties to the agreement are the Mechanical Contractors Association - Zone 7 and Local 527. The signing page is identical in printed wording and style to the one which he signed in October 1980. The name, address and telephone number of the partnership is typed in and McNeil's signature appears under that information. The partnership ended approximately a year later. The rest of McNeil's experience with collective agreements has been as an employee of contractors.

12. In cross-examination he testified that he did not pay too much attention to collective agreement booklets sent to him by the Local from time to time as new agreements were negotiated respecting his employers. He stated that he usually looked at them and then discarded them. He also testified that he had stopped attending union meetings, including ratification meetings, by the mid-1970's. When he was challenged with respect to that testimony, he admitted that he had attended the membership meeting of Local 527 in May 1980 when the Local voted to ratify the new provincial agreement which had been negotiated between the Association and the Council and which was binding on Local 527. It was at this time that McNeil was just starting into business for himself. Crystal testified that McNeil's attendance at the membership meeting had been challenged by some members because of this, but he was entitled to be in attendance and remained in attendance for the meeting. McNeil also acknowledged that the agreement was ratified after a province-wide strike of plumbers covered by the expired provincial agreement.

13. From November 1980 through the end of May 1982 City conducted itself as though bound to a collective agreement. It filed a remittance form for the month of November reporting 144 hours of work for McNeil on which contributions were calculated and paid for the various funds set out in the *1980-82 provincial agreement*. On January 5th, 1981 McNeil requested Local 527 to refer to him for employment two journeymen plumbers, one of whom he requested by name. This procedure is referred to in the Local as a "name call". The journeyman requested by name was referred to City and employed for approximately two and a half weeks. McNeil cancelled the order for the second journeyman after the name call order was filled. City filed remittances for the journeyman for 89 1/2 hours worked in January. City hired a new apprentice in February 1981 and referred him to the union for clearance in accordance with the practice of Local 527. The apprentice worked for City until the latter part of May 1981 and remittances were filed on his behalf for the months of February through May. On June 4th McNeil called Local 527 for another apprentice and the union referred Kevin Benn. Benn worked for City until approximately the end of January, 1982, and the respondent made remittances on his behalf for all of those months. A remittance was filed in the month of September 1981 on behalf of McNeil for 160 hours. The remittance forms filed by City show contributions made with respect to the various benefits and to their respective trust funds at the rates required under the *1980-82 provincial agreement*. The remittance filed for Benn for the month of January 1982 was the last one filed on which any employees are named. Those filed for the months of February through May 1982 indicated no employees had worked. These are referred to as "nil reports". It is a requirement of the agreement that reports be filed each month even though no employees were working under the agreement.

14. The May 1982 remittance form was accompanied by a letter signed with the name of McNeil's wife, the text of which states: "We will remit benefits when money is owing". McNeil disclaims any knowledge of the letter having been sent or why those words were used.



He presumed it meant that money would be owing and paid if members of the union were hired by the respondent. He told the Board that he had expected to hear from the union by April 1982, that it wanted City to sign another collective agreement. When nothing happened, he went in May to see City's accountant. As a result of his conversation with the accountant, McNeil concluded two things. First, that his pension was secure whether or not he remained a member of Local 527. Second, the document which he had signed in October 1980 was void at the time because it had already expired when he signed it. On the basis of his conclusion, he decided that he did not have to go to the union for employees and would not have to file any more remittance forms including the "nil reports".

15. It is unclear from McNeil's evidence when in May he spoke to his accountant, but on May 10th, he requested another apprentice from Local 527. As a result of a province-wide, lawful strike of plumbers in the ICI sector of the construction industry which was underway at the time, the union cancelled his order without filling it. On May 12th Porter confronted McNeil about a person he had seen driving City's van whom Porter did not recognize as being a member of Local 527. McNeil told him that he had hired a person by the name of Al Lewis on March 25th, 1982 and that Lewis had been doing work for him since then. Porter told McNeil that he should not be employing persons who are not members of Local 527. McNeil in turn told Porter that he would let Lewis go and had been going to do so in any event because he was getting too many complaints about his work. McNeil also told Porter that he would be calling the union for apprentices. In fact, the respondent employed Lewis for a further two or three weeks. During the conversation with Porter, McNeil said nothing about his thinking that the respondent was now a non-union company for the reason that he did not want to invite problems.

16. There was no further contact between City and Local 527 until the filing of this grievance, except City paid McNeil's union dues for 1983. His 1982 dues had been paid for twelve months in advance by City as well. When McNeil was challenged in cross-examination that the payment of his 1983 dues was inconsistent with his testimony that he had decided, after talking to his accountant, to leave the union, he responded that the cheque had been sent by his wife. McNeil admitted that he signed all of City's cheques and would have signed that one, but would have done so without realizing it. He testified that his wife prepared cheques to suppliers and bills to customers once a month and he signs the cheques as prepared without looking to see who is the payee or what is the amount of the cheque. He said that this sometimes resulted in City paying the same account twice.

17. The grievance at issue was filed after Crystal had tried unsuccessfully to have McNeil contact him about two separate complaints he had received from members of the Local. The complaints were that persons other than McNeil might be working for City. Crystal had received a telephone message that McNeil had nothing to discuss with the union. In addition to filing the grievance, Crystal checked the records of McNeil's membership dues and found him to be in arrears in his dues. A letter was sent to McNeil to that effect and McNeil admits that he was expelled from union membership during the summer of 1984 for the non-payment of his monthly dues. Crystal told the Board that it was not his practice to routinely check the "one man shops" under collective agreements with Local 527 to make sure they are complying with the agreement. This is because the owners are usually members of Local 527 and know the requirements of the collective agreement when they hire employees. Therefore, he had not been checking between May 1982 and June 1984 to see if City was doing any work under the collective agreement using persons other than McNeil.



18. Steven Morrison was one of the two Local 527 members who reported to Crystal that someone other than McNeil was driving City's van. Morrison has been a steward of the Local since 1979 and a member of its executive board since January 1983. He has known McNeil for six years. They met through their wives, have mutual friends and belong to the same fraternal order. They have seen quite a lot of each other socially, as a result, except during about one and one-half years from 1982 when Morrison was away from Kitchener. During that period he saw McNeil usually only at meetings of their fraternal order. They did not discuss McNeil's business affairs at those meetings. However, Morrison did know something of City's business from its start in May 1980 until 1982 from discussions with McNeil. He knew City to be a union contractor from the start. Morrison denied in cross-examination that some time early in 1982 McNeil told him that City was employing non-union plumbers, although early in the business, McNeil did mention that City was using persons who were "not plumbers". Morrison chose to do nothing about it because of their personal relationship. When Morrison did report to Crystal the incident about City's van, he did so because he and Crystal had been talking about the need to make sure contractors already under agreement with Local 572 were honouring their agreements before the Local tried to organize non-union contractors. Prior to the incident that Morrison had reported, he had not seen anyone but McNeil driving City's van. Morrison acknowledges that could be because he works mostly outside of Kitchener. McNeil testified in chief that he had told Morrison in May 1982 that City was no longer a union contractor and that Morrison responded by asking how many employees City had. McNeil also named another executive board member and the secretary-treasurer of Local 527 as persons who were aware that City was working non-union. He admitted in cross-examination, however, that he had been talking to Morrison about residential work, not work in the ICI sector, and about drywall and painting work, not plumbing.

19. The submissions of respondent counsel with respect to the three preliminary issues placed primary emphasis on the contention that the respondent had not entered into any valid voluntary collective agreement or valid voluntary recognition agreement with Local 527 for one or more of the following reasons:

- (1) the parties were of different minds about what it was they were agreeing to when they signed the document referred to as the 1978-80 plumbers provincial agreement;
- (2) the document was void from the start because it had already expired when it was signed; and
- (3) the respondent was never a party to the document because, while it was the company carrying on business at the time of signing, the document was signed in the name of City Plumbing and Heating Services, a company which was not carrying on business at the time of signing.

20. With respect to the contention that the parties were of different minds about what it was they were signing, counsel argued that McNeil believed he was signing something for the protection of his pension benefits and that he had no knowledge of the document which he actually signed. Furthermore, it was not his document, was fundamentally different from what he thought he was signing and contained terms such as the duration of the document

and the provisions for its termination which were not within his control. In any event, if the document which he signed was a provincial agreement which, by statute, could bind his business indefinitely, it was fundamentally unfair that he be asked to sign it without any explanation of what it was in light of his limited, prior experience with such matters. According to counsel, this experience consisted of signing a collective agreement in 1975 for a short-lived business partnership and as an employee in the plumbing and pipefitting trades since 1968 where it was his experience that collective agreements were negotiated every couple of years between Local 527 and individual employers, not with an employers' association. Also, because of his limited experience, McNeil could not be seen to have been negligent in failing to ask for a full explanation.

21. In dealing with the second branch of his argument, counsel submitted that there was nothing which McNeil could have done or did do which altered the simple fact that the provincial agreement document which he signed had already expired. Therefore, any evidence purporting to show that City had performed under the document cannot be relied upon, particularly since City ceased doing those things which might be seen as performance as soon as McNeil came to the conclusion that it was void at the time of signing.

22. In support of his argument that City was never a party to the document signed by McNeil in October of 1980, counsel submits that the document purports to be between Local 527 and City Plumbing & Heating Services an unincorporated business which was not conducting any business in October 1980. Rather, at that time, City was carrying on the business for which purpose it had been incorporated in June 1980.

23. For all of these reasons, but particularly because of the fact the 1978-80 plumbers' provincial agreement document which McNeil signed had already expired and because of his lack of knowledge with respect to what it was he was signing, counsel submits that City has entered into neither a voluntary collective agreement nor a voluntary recognition agreement.

24. Counsel's arguments that Local 527 had abandoned its bargaining rights or should be estopped from enforcing them are made in the alternative should the Board find that City and Local 527 are bound to a valid collective agreement. The factual basis argued for abandonment of bargaining rights is that Local 527 had knowledge, at least from May 1982 until it filed its grievance in June of 1984, that the respondent was not following the collective agreement upon which Local 527 realizes in making this referral, and that Local 527 took no action during that interval to assert its bargaining rights with respect to employees of City. Counsel was relying generally on the Board's jurisprudence with respect to the abandonment of bargaining rights by trade unions, but seeks to distinguish the instant case from the Board's decision in *Culliton Brothers Limited*, [1982] OLRB Rep. March 357 on its facts. Counsel argues that the Board in *Culliton* found that there had been no abandonment of bargaining rights primarily because the union had been unaware that it was bound together with the employer to a provincial agreement, whereas in the instant case, Local 527 was aware of its bargaining rights, but failed to act upon them.

25. Finally, should the Board find that Local 527's bargaining rights have not been abandoned counsel contends that Local 527 should be estopped from exercising any of its rights under the collective agreement because all of the elements are present to allow the Board to apply the doctrine of estoppel. Counsel argues that Local 527 was aware of City's breach of the collective agreement between May 1982 and June 1984 when Local 527 served this

grievance on City. That awareness, counsel states, is in Morrison's knowledge from his conversations with McNeil in which McNeil stated that City was using non-union employees to perform its work. That knowledge notwithstanding, Local 527 did not act to enforce any of the terms of the provincial agreement. City accepted that acquiescence and altered the way it conducted its business. In particular, it ceased to request men from Local 527 and to file remittances as required by the provincial agreement. The detriment to City, having relied on Local 527's inaction, is in the fact that City has had to incur expense to defend itself in these proceedings, and, if the union succeeds in this referral, City may have to discharge employees and pay damages with respect to work already performed.

26. The Board has reviewed and weighed the witnesses' testimony having regard to the firmness of their recall of the events about which they were testifying, their ability to relate those events clearly and to resist the influence of self-interest, and their general demeanor and relative credibility. The Board has also reviewed and considered the submissions of counsel for the parties on the evidence and relevant law. The Board does not propose to set out detailed findings of fact, but the conclusions which it has reached and set out below are based on the Board's assessment of all of the evidence and the submissions of the parties.

27. The Board is satisfied on the evidence that, on the day in October 1980 when he signed the signing page of the document upon which Local 527 is relying to establish that it holds bargaining rights for City's plumbers in the ICI sector of the construction industry, McNeil knew that he had signed a document both he and Porter believed to be a voluntary collective agreement. He may or may not have gone to the union office with that objective in mind. There is no doubt that he and Porter discussed the alternatives open to McNeil with respect to his union membership and his pension, but the Board is satisfied that was not the sole topic of conversation between McNeil and Porter. Nothing in Porter's demeanor as a witness gives the Board cause not to accept his evidence that McNeil said he wanted to be a union contractor and to get men from the union. McNeil did not deny the conversation. Furthermore, the documents which McNeil was given while there and which he took with him when he left the office, as well as his ensuing conduct lend credence to Porter's evidence.

28. The Board finds less credible McNeil's response to questions put to him in examination-in-chief and cross-examination about what he thought he had signed that day. In chief, he stated that he thought he was signing something to preserve his pension, there was only the page which he signed and he saw nothing else. In cross-examination he testified that he expected to have to sign something in order to be able to remit annual pension contributions for 144 hours of work. As the Board has noted above in paragraph 10, apart from the signing provisions on the page, the only text on it is the following appearing under the marginal heading "Conclusion":

It witness whereof each of the parties hereto has caused this Agreement to be signed by its duly authorized representatives as of the day and year first above written.

There is no mention of pensions in that wording. Putting McNeil's evidence at its highest, he did not say that Porter told him he was signing something about pensions. His evidence was that Porter did not tell him what he was signing.

29. Thus the Board prefers Porter's evidence of the events leading up to the signing and finds that, when McNeil, Porter and Crystal signed the signing page of the document in



issue, McNeil knew the page was part of a document Local 527 believed would form a voluntary collective agreement between the Local and McNeil's company. The Board finds, therefore, that McNeil intended to bind his company to the document.

30. The Board disagrees with counsel for City that the document was not an agreement between City and Local 527 because it was signed in the name of City Plumbing and Heating Services at a time when City Plumbing (Kitchener) Limited had been incorporated, and after the unincorporated business City Plumbing and Heating Services had ceased to operate. McNeil testified that the style City Plumbing & Heating Services had been used on the business' vehicles from the start, and the Board so finds. Therefore, the Board finds that City has been represented to the public as City Plumbing & Heating Services. In those circumstances, when McNeil signed the document on behalf of City Plumbing and Heating Services, the Board is satisfied he was signing it for City.

31. The form of the document which Local 527 and McNeil signed was in the form of a collective agreement. More particularly it was comprised of the master portion of the plumbers provincial agreement and the local appendix of the plumbers provincial agreement applicable to Local 527's geographic jurisdiction. Pursuant to section 137(e) of the Act, a provincial agreement by definition must be between a designated or accredited employer bargaining agency which represents employers in province-wide, multi-employer bargaining in the ICI sector of the construction industry and a designated or certified employee bargaining agency which represents affiliated bargaining agents in province-wide, multi-employer bargaining in the ICI sector of the construction industry. The document which Local 527 and McNeil signed is, on its face, between designated employer and employee bargaining agencies with respect to plumbers. Pursuant to section 146(1) of the Act, the employer and employee bargaining agencies can only have the one provincial agreement for plumbers. By the definition of provincial agreement in section 137(e), Local 527 and City cannot be parties to the plumbers provincial agreement. Section 146(2), when read together with the definition of bargaining in section 137(b) and provincial agreement in section 137(e), operate to prohibit them from entering into a collective agreement or any other arrangement respecting plumbers employed in the ICI sector, to adopt the words of section 146(2), "... other than a provincial agreement as contemplated by [section 146(1)], ....". (See *Diversified Sheet Metal Limited*, [1981] OLRB Rep. Nov. 1575, at paragraph 7 and *Manacon Construction Limited*, [1983] OLRB Rep. July 1104, at paragraphs 13, 14 and 15.)

32. The document they signed was a copy of the plumbers provincial agreement, albeit on its face expired. While City and Local 527 cannot sign the plumbers provincial agreement as parties to it because that agreement, by definition, is between the employer and employee designated bargaining agencies respecting plumbers, they can sign an arrangement by which they bind themselves to the plumbers agreement. When section 146(2) is read in the context of the entire scheme of the province-wide bargaining part of the Act, it provides amongst other things, for affiliated bargaining agents and employers to enter into voluntary collective bargaining relationships respecting employees in the ICI sector by binding themselves to the relevant provincial agreement. That is what City and Local 527 did when they signed the 1978-80 provincial agreement document.

33. In the Board's view, the fact that the specific document which they signed had expired on its face does not nullify the binding nature of their act of signing. City and Local 527 signed the document in October 1980. McNeil knew at the time, on his own evidence,



that the new plumbers provincial agreement had been ratified and was in effect. The signing page together with the rest of the document of which it is part, form a clear intention of City and Local 527 to be bound to the provincial agreement which was in effect when they signed. At the very least, what they signed is a voluntary recognition agreement, the effect of which would be to bind them to the provincial agreement in effect in October 1980.

34. Furthermore, City performed under the terms of the 1980-82 plumbers provincial agreement beginning the very next month with respect to the payment of welfare and pension contributions on McNeil's behalf. Beginning in January 1981 thru May 1982, City hired journeymen and apprentices in compliance with the hiring provisions of the agreement and Local 295's hiring hall practices. City remitted contribution and remittance reports pursuant to the 1980-82 provincial agreement. Having conducted itself in that manner, City cannot simply turn around because Local 527 referred this grievance for resolution under section 124 of the Act and seek to repudiate the consequences of its actions. That is not to say that parties who conduct themselves as though they were bound to a collective agreement are bound to it absent a signed, written agreement, whether in the form of a collective agreement or a voluntary recognition. In other words, if the only evidence here was that City had asked the union to supply journeymen and apprentices and had made remittances for benefits the same as set out in the provincial agreement, it would not be evidence that City was bound to the agreement.

35. Counsel for City argued that the evidence of requests for journeymen and apprentices and the making of remittances is not evidence of performance under the provincial agreement because there is no evidence that these things were done respecting employment in the ICI sector. The Board finds that argument not to be persuasive. The onus was with City to prove its conduct was not performance under the agreement. It is not sufficient to say that work in the ICI sector represents only 10 per cent of City's construction work. In any event, even if City only did 10 per cent of its work in the ICI sector, that is enough to bind it to the agreement which the Board has found it signed with Local 527. Nor is it relevant to the fact of whether City is bound to the current provincial agreement that McNeil thought City was no longer under a collective agreement obligation to Local 527 because it had not approached him about a new agreement in April 1982. Under the province-wide bargaining scheme for the ICI sector of the construction industry, Local 527 does not bargain for the provincial agreement. That right and duty is vested solely in the designated employee bargaining agency, or for City, the designated employer bargaining agency under sections 142 and 143 of the Act. For the same reason, Local 527 has no legal power to give notice in its own name to bargain respecting the ICI sector. See *Spears Brothers*, [1980] OLRB Rep. July 977. The designated bargaining agencies have bargained and concluded successive provincial agreements respecting plumbers. By statute, these have been made to expire "... on the 30th day of April calculated biennially from the 30th day of April, 1978." in accordance with section 146(3) of the Act.

36. For all of the foregoing reasons, the Board finds that City is bound together with Local 527 to the plumbers 1984-86 provincial agreement which is effective from May 14, 1984 to April 30th, 1986 and has been bound to the predecessor provincial agreements which expired April 30th, 1982 and 1984. It is necessary, therefore, for the Board to address the argument of counsel that Local 527 had abandoned its bargaining rights for plumbers employed by City in the ICI sector of the construction industry, or, in the further alternative, that Local 527 should be estopped from pursuing its rights under the provincial agreement.

37. When counsel made his argument respecting abandonment, which is summarized above, and sought to distinguish the instant case from the Board's decision in *Culliton Brothers, supra*, counsel for Local 527 argued in rebuttal that the decision stands for the proposition that there cannot be abandonment of bargaining rights under the province-wide bargaining scheme of the Act. It is not necessary for the Board to decide the issue on his reading of the case. A finding of whether there has been abandonment of bargaining rights has always been a finding of fact: either the union has or has not abandoned its rights. In this case, the facts simply do not support a finding that Local 527 has abandoned its bargaining rights respecting City's employees. City obviously has been working on small jobs. Crystal testified that he does not check out the one-man shops because they are owned mostly by members of Local 527 who know their obligations under the agreement. Even if he took a more aggressive approach, it would be an onerous task, if not economically infeasible, to follow contractors like City to see if they are doing work covered by the agreement using employees, as opposed to working themselves. Local 527 representatives have acted diligently when there was reason to believe City might be violating the agreement. When Porter noticed City's truck being driven by someone he did not recognize, he followed it and confronted McNeil. When Crystal received a tip from Morrison, he followed up on it and filed the grievance. This is not evidence of abandonment of bargaining rights, particularly when those rights only apply in the ICI sector and, according to McNeil, City only works intermittently in that sector. On those facts, the Board finds that Local 527 has not abandoned its bargaining rights respecting City's employees in the ICI sector.

38. With respect to Local 527 being estopped from pursuing its rights under the provincial agreement, the factual basis on which counsel was relying, that is, that Local 527 was aware of City's breach of the provincial agreement and failed to assert its rights at the time, is not made out on the evidence. Counsel argued that Local 527 was vested with the knowledge of the breach through Morrison from a conversation he had with McNeil. McNeil's own evidence of that conversation is that he was referring to drywall and painting work in the residential sector, not to plumbing work in the ICI sector. Therefore, the grounds for applying the doctrine of estoppel are not present.

39. In the result, the Board reiterates its finding made above that City Plumbing (Kitchener) Limited is bound to the plumbers provincial agreement effective from May 14, 1984 to April 30, 1986 and had been bound to the prior provincial agreements which expired April 30th, 1980 and 1982. The Board makes no finding as to the liability or, of course, to damages. The Board directs the parties to seek to settle those issues. If the parties are unable to do so, the Board will list the matter for continuation of hearing with respect to the remaining issues on the written request of either party.

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**2778-84-UCanadian Union of Public Employees, Complainant, v. Extendicare Health Services Inc., Respondent**

**Change in Working Conditions - Interference in Trade Unions - Unfair Labour Practice**  
**- Whether management rights clause or hours of work clause of expired agreement entitling employer to set new normal hours of work during freeze period - Whether direct dealings with employees or criticism of union unlawful interference**

**BEFORE:** *Lita-Rose Betcherman*, Vice-Chairman, and Board Members *A. Grant* and *P. V. Grasso*.

**APPEARANCES:** *James K. McDonald*, *Bruce Land* and *Gloria Dodd* for the complainant; *Robert Atkinson*, *David Cameletti*, *B. H. Stewart* and *Scott Thornton* for the respondent.

**DECISION OF THE BOARD;** November 6, 1985

1. The name of the respondent is amended to "Extendicare Health Services Inc."
2. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent (1) interfered with the administration of the trade union by bargaining directly with the employees in violation of sections 64, 66(1), 67 and 70, and (2) altered terms and conditions of work during the freeze period in violation of section 79 of the Act and section 13 of the *Hospital Labour Disputes Arbitration Act*. In the course of the hearings, the complainant union withdrew allegations of bad faith bargaining.
3. In January, 1984 the respondent purchased this 214-bed nursing home. The complainant represents 130 full-time and part-time employees at the Home all of whom are in the same bargaining unit. The terms and conditions of the collective agreement, extended by the *Inflation Review Act*, were due to expire at the end of March and on January 9, 1984, the complainant served notice to bargain a renewal of the agreement upon the respondent, thus triggering the freeze period.
4. Attempts to include this Home in joint negotiations with other CUPE Homes belonging to the respondent failed. Separate negotiations were equally unsuccessful. The union applied for conciliation and ultimately binding arbitration pursuant to the *Hospital Labour Disputes Arbitration Act*. On December 11, 1984, the parties were advised that a hearing date for the arbitration had been set for the end of April, 1985.
5. During the stages of the bargaining process, the respondent had been conducting a review of its newly-acquired facility. A number of problems were identified and it was decided that various changes were necessary, such as the realignment of some units, regrouping of some residents, peak period staffing, an additional RN for improved supervision and more Activities personnel to initiate a restorative programme among the residents. There was never any doubt that a reduction in staff hours would result from these changes. Before the changes could be implemented, however, an in-service training programme and audit was to be completed. Implementation was further delayed by changes in senior management at the Home. Several supervisors were replaced and a new Administrator, Mr. Scott Thornton, was appointed in April, 1984. In any event, it was not until December, 1984 that the decision was made



to proceed with the staffing changes. Mr. Thornton was instructed by the head office to work out details and to contact the union.

6. On December 31, 1984, Mr. Thornton advised the president of the local union, Ms. Gloria Dodd, that staff reductions were imminent. He suggested calling a meeting of the Labour-Management Committee to discuss the changes and asked her to invite Bruce Land, the business representative who services this local union, to attend. Ms. Dodd informed Mr. Land of her conversation with Mr. Thornton, expressing the opinion that the changes would not be major.

7. On January 2, 1985, a Labour-Management Committee meeting was held, attended on the union side by Ms. Dodd, the vice-president Ms. Bostick, and a steward Ms. Teleford. Mr. Thornton advised them of the coming cutbacks and solicited their advice as to how these could best be accomplished in accordance with the seniority provisions of the agreement. He told them he was planning to hold individual interviews with the employees to enable them to select shifts and hours under the new scheduling arrangement; he showed them samples of letters going out to each employee in this connection. It is agreed that the union members raised no objection to the company's plans at the committee meeting. At Ms. Dodd's request, Mr. Thornton held two meetings on January 3rd to explain the changes to the staff at large.

8. Subsequent to the January 2nd meeting, Ms. Dodd reported to Mr. Land that the proposed staffing changes would be "drastic" after all. On January 4th, Mr. Land telephoned Mr. Thornton. He stated that the company was violating the statutory freeze period and asked to meet with someone at the head office. At a meeting of the local union on January 6th, with Mr. Land present, it was decided that the union would not co-operate with the company in the cutbacks; in particular, the employees would not select shifts and hours under the new schedule. This decision was not communicated to Mr. Thornton.

9. On January 7th Mr. Thornton held interviews with the two most senior employees affected by the changes. Ms. Bostick sat in at the meetings. Neither employee would make a selection among the shift options offered, stating that they disagreed with the company's actions, and referred Mr. Thornton to the union. Ms. Bostick stated that she could not speak for the union. Mr. Thornton testified that he was confused by the employees' attitude as he was under the impression that he had reached an understanding with the union at the January 2nd Labour-Management Committee meeting. According to the testimony of the three employees involved in the interviews, Mr. Thornton stated that "Bruce Land was the cause of all this" and said that if the union wanted to play hardball, the company would too. Mr. Thornton did not deny making these comments, but stated that the reference to hardball was simply a relay of a remark made by the respondent's vice-president. He also acknowledged saying that Russia was the only country where people did not have the opportunity to express a choice. After these abortive interviews, Mr. Thornton cancelled the rest. According to a union witness, Mr. Thornton met later that same day with five or six employees. She testified that he was upset at having to cancel the interviews and told the employees that they were the union and should make their own choices. Mr. Thornton testified that he did not recall such a meeting taking place.

10. On January 9th, Mr. Land met with the respondent's vice-president in charge of Human Resources and its manager of labour relations. He stated that the proposed changes were a violation of the statutory freeze and of the collective agreement. While making it clear



that the reduction in hours would be implemented, the company officials asked Mr. Land if he would discuss without prejudice ways or means of lessening the impact on the staff. Mr. Land declined. He testified at the hearing that in his view any co-operation would have constituted acquiescence in what the union regarded as the company's illegal actions.

11. On January 21st the manager of labour relations telephoned Mr. Land to say that the company had developed alternative staffing patterns which would lessen the number of affected employees and, furthermore, that the implementation date had been postponed for a month until February 25th. Mr. Land reiterated that the union would not co-operate in any staff reduction. He advised the labour relations manager that the union had filed the present complaint with the Labour Relations Board.

12. On January 25th Mr. Thornton convened a Labour-Management Committee meeting to discuss the revised schedule with the local union executive members. He again attempted to enlist their co-operation with little success. The union members involved alleged that Mr. Thornton made various statements critical of Mr. Land and the union; while denying most of their allegations, Mr. Thornton acknowledged that he referred to Bruce Land's opposition to the company's plans and that he mentioned the word "pawns" although he meant to include himself when he used it. Later that day, Mr. Thornton convened a general staff meeting to explain the revised schedule. According to union witnesses, he criticized the role of the union, accusing it of misleading the employees and of forcing them to give up the right to make their own decisions. What was said, according to Mr. Thornton, was that there was a great deal of misinformation floating around and that the union did not have its facts and figures correct. He acknowledged telling the employees that they had the right to make their own decisions.

13. On this same date, January 25th, letters were sent to all employees asking them to come for interviews regarding the revised schedule. On January 31st the employees were interviewed by Mr. Thornton in groups of four. About half the employees selected shifts and hours from among the options offered to them.

14. On February 25th the staffing changes took place. A document entered as Exhibit 40 details the changes. Prior to February 25th, 1985, all 130 employees with 11 exceptions worked fixed 7-1/2 - 8 hour shifts; of these 76 worked full-time and 54 worked part-time. After that date, a number of employees had their shifts changed; 11 full-time employees and 20 part-time had their shift hours reduced; 7 part-time employees had their hours increased although some now worked short shifts: the overall result was a net decrease in hours of 3.5% or 125 hours per week.

15. In support of its allegation that the respondent has violated the statutory freeze, the complainant argued as follows: Article 12:01 of the collective agreement establishes a normal work day of 8 hours for nursing staff and 7-1/2 hours for non-nursing staff. It was pointed out that the agreement did not include a disclaimer to the effect that Article 12:01 did not represent a guarantee of hours of work and evidence was adduced to show that the company was attempting to introduce such a clause in the new agreement. It was submitted that Article 12:01 represented a norm and that in reducing the hours of so many employees unilaterally, the respondent established a new norm. This action ran counter to past practice whereby employees were always assigned full shifts, the few existing exceptions having been made with the union's consent. It was submitted that the changes were a new development which the employees could not have reasonably expected and that this in itself indicated a violation of

the freeze. *Simpsons Limited*, [1985] OLRB Rep. April 594. Counsel argued that there was no compelling business reason to justify the respondent's action.

16. With regard to its allegation that the respondent had violated sections 64, 66, 67, and 70 of the Act, the complainant argued thusly: Notwithstanding the union's express objections to the staffing changes Mr. Thornton attempted to effect these changes by negotiating directly with the employees. Furthermore, he made statements to the employees likely to undermine the union's credibility. It was submitted that through his actions Mr. Thornton interfered with the bargaining process and with the administration of the union, contrary to the aforesaid sections of the Act.

17. The respondent's position is that it had the right to reduce hours of work under the collective agreement and that this right continued under the freeze. It was argued that Article 12:01 does not provide a guarantee of work even without a disclaimer clause and that Article 12:01 expressly contemplates a reduction in hours. As well, the respondent relied upon the language of the management rights clause (Article 2:01) which gives the employer the right to determine "the allocation and number of employees required," citing as authority the Board's decision in *Scarborough Centenary Hospital Association*, [1978] OLRB Rep Oct. 949. Counsel submitted that, in order to show a violation of the freeze, the union would have to prove that the company was estopped from exercising its alleged right to reduce hours. Counsel emphasized that the evidence revealed only one instance where the predecessor employer had asked the union's consent to reduce the hours of a few employees and argued that this was insufficient to support a finding of estoppel. He further pointed out that at the time of the acquisition eleven employees were working short shifts. Counsel asserted that the "reasonable expectations" test applied only to first agreements. In support of the proposition that an employer did not need "compelling" business reasons to exercise its rights during a freeze period, he cited the decision of the Board in *Corporation of the Town of Petrolia*, [1981] OLRB Rep. March 261. The respondent stressed that it had *bona fide* reasons for its actions, namely improved delivery of care and cost efficiency.

18. With respect to the charge of bargaining directly with the employees, the respondent asserted that there was no bargaining in process at the time as the parties were waiting for arbitration and, secondly, that Mr. Thornton's interviews and staff meetings were predicated upon the company's right to make changes in shifts and hours of work. Counsel analyzed the sections of the Act purportedly violated and the evidence regarding Mr. Thornton's comments and postulated that the former were not applicable and that the latter fell within an employer's permitted freedom of expression.

19. The provisions of the collective agreement referred to by the parties are reproduced in relevant part below:

ARTICLE 2:00 - MANAGEMENT RIGHTS

2:01 The union recognizes that it is the right of the employer to exercise the regular and customary functions of management except insofar as such rights are modified or limited by this agreement.

The union recognizes that it is the regular and customary functions of the employer to

• • •

- (c) generally manage and operate the Nursing Home in all respects in accordance with its obligations, determine the kinds and locations of machines, equipment to be used, the allocation and number of employees required, the standards of performance for all employees, and all other matters concerning the Nursing Home's operations.

#### ARTICLE 12 - HOURS OF WORK

12:01 *Dietary & housekeeping aides, nurses' aides, cooks 1 & 11, maintenance man and activities director*

- (a) The normal hours of work shall average thirty-seven and one half (37-1/2) hours per week, over the four (4) week work schedule, but shall not exceed seventy-five (75) hours in any two (2) week period. The standard hours of work shall be seven and one-half (7-1/2) hours per day. Any work performed in excess of seventy-five hours in a two (2) week pay period shall be compensated at the rate of time and one-half regular straight time pay.

*Registered Nurses, Graduate Nurses and Registered Nurses' Assistants*

- (b) The normal hours of work shall average forty (40) hours per week over the four (4) week work schedule, but shall not exceed forty eight (48) hours in any one week. The standard hours of work shall be eight (8) hours per day. Any work performed in excess of eighty (80) hours in a two week pay period shall be compensated at the rate of time and one-half regular straight time pay.

12:10 Employees shall not have their hours of work reduced without prior notification of the union by the employer.

20. There is no dispute that the respondent substantially altered the hours of work of a considerable number of employees during the freeze period. There is no question that this constituted a new schedule of indefinite duration and not merely a temporary change in hours. It is common ground that the number of residents at the Home remained the same. The evidence discloses that as of January 4, 1985, the respondent had learned from a union official in authority that the union disapproved of its plans. Any possible doubt that the local union concurred with Mr. Land should have been dispelled by the upshot of the employee interviews on January 7th. The Board holds that the eleven short shifts in place were not a precedent for the reduction in hours in that the union had agreed to the former.

21. The purpose of the statutory freeze is to provide a period of stability during the negotiation of a collective agreement. In determining whether the freeze has been violated, the Board asks whether the employer is conducting *business as before* (*Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859). In that there is a successor employer involved, it is worth stating that the "business as before" test applies to the predecessor employer's conduct of business at this nursing home and not to the successor employer's method of operation at its other facilities.

22. The question is whether the respondent had the right during the freeze to unilaterally reduce hours of work to the extent it did. Section 79(1) of the Act preserves "terms and conditions of employment or any right, privilege or duty, of the employer, the trade union or the employees." Where an agreement is under renewal as in the instant case, the Board will look first of all at the expired agreement to discover the terms and conditions of employment.

23. In the Board's view, the management rights clause does not assist the respondent.



While that clause enables the employer to determine the number and allocation of employees required, there is nothing in it which gives the employer the right to shorten normal hours of work. In the *Scarborough Centenary Hospital Association, supra*, case, the Board found that this language entitled the employer to determine the *number* of employees required as cashiers; it also found that the status of the employee in question had been changed: that is not so in the present case. In Article 12 the parties have specifically addressed the matter of hours of work and it is this article which is relevant to the issue.

24. To determine whether the employer had the right to reduce hours under the expired agreement, it is instructive to look at the arbitral jurisprudence. The practical question is this: During the term of the most recent collective agreement, would the complainant have been able to grieve the reduction of hours successfully?

25. In *Re Ballycliffe Lodge and Service Employees Union, Local 204*, (1984) 14 L.A.C. (3d) 37 (Adams), the “hours of work” clause was essentially the same as in the instant agreement: in addition, there was a “no guarantee of hours to be worked” clause. At page 44 of the award, the majority of the arbitration board observed:

The general acceptance that a “normal hours of work” provision does not constitute a guarantee of hours to be worked is itself subject to the parallel understanding that a new norm cannot be established by unilateral management initiative.

The award goes on to say that an hours of work clause “stipulates what the normal hours of work per day are to be, and by this stipulation, management is precluded from establishing a new norm by the indefinite or ongoing scheduling of hours per day and different from those set out in [the hours of work clause].”

26. In *Re E.S. & A. Robinson (Canada) Ltd. and Printing Specialties & Paper Products Union, Local 466*, (1976), 11 L.A.C. (2d) 408 (Swan), where the agreement provided for a “normally designated work week”, the majority of the board upheld the employer’s right to shorten working hours temporarily to avoid layoff, but held that a new schedule of normal hours was not permitted. The award states at page 414:

The company would be unjustified in changing that normal designation in any way which would create a new norm, but it would be justified, in appropriate circumstances, in scheduling work in an “abnormal” way. Whatever else this may mean, it would certainly prohibit any permanent or long-term change, by unilateral action, in the work-week.

27. The above-quoted awards of two of the leading arbitrators of the province indicate that an “hours of work” clause, such as Article 12.01 in the instant agreement, while not guaranteeing hours of work, would not permit the employer to establish new, normal working hours unilaterally. The employer’s case law is not inconsistent with the foregoing arbitral opinion in that, in almost all the cases cited, the reduction in hours was temporary or governed by different contractual language.

28. In the Board’s view, Article 12:10 does not override Article 12:01 and, in fact, is consistent with the above interpretation. Article 12:01 does not prohibit the employer from reducing hours temporarily under certain circumstances. All Article 12:10 says is that when this occurs, the union must be notified. To construe Article 12:10 as a permit for the employer to impose new normal or standard hours of work at will would be to negate the normal or standard hours of work set out in Article 12:01.



29. At the very least, the Board finds that the employer did not have the express right prior to the freeze to introduce, without the union's consent, new normal hours of work differing from those set out in Article 12:01. However, as well as terms and conditions of employment, section 79 freezes rights and privileges. The Board must now examine the relationship of the parties to see if it has generated a "privilege" protected by the freeze. As the Board stated in *A E S Data Limited*, [1979] OLRB Rep. May 368, "The section requires both parties to maintain the existing pattern of their relationship." The evidence discloses that prior to the freeze there were no short shifts at this Home except with the union's consent. Thus, given this interpretation of the collective agreement, the Board considers that full-time non-nursing staff could reasonably expect to work 7-1/2 hours a day and nursing staff 8 hours a day during the freeze - the test set out in *Simpsons Limited*, *supra*. The Board concludes that the relationship between the parties did not give the employer the privilege to shorten normal hours of work unilaterally.

30. For the foregoing reasons, the Board finds that the employer violated section 79 of the *Labour Relations Act* and section 13 of the *Hospital Labour Disputes Arbitration Act* by shortening the working hours of some employees as it has done.

31. With respect to the other complaints, the Board finds on the evidence that the respondent was attempting to effect the desired staffing changes through direct dealings with the employees rather than with their bargaining agent. Moreover, we find that Mr. Thornton's comments at the employee interviews and at the staff meetings tended to undermine the credibility of the complainant in the eyes of its membership. The Board concludes, therefore, that the respondent interfered with the administration of the trade union in contravention of section 64 of the Act. The respondent acknowledged that it conducted itself as it did, in the face of the union's objection, on the assumption that it was acting within its rights. Since this assumption has been found to be incorrect, the respondent's case on this head falls to the ground.

32. The Board declares that the respondent has violated the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* and orders the respondent to cease and desist violating the aforesaid Acts. The Board directs the respondent to compensate the affected members of the complainant union for all losses suffered as a result of the alteration in hours. The Board rejects the complainant's request for a posting as unnecessary once the respondent's misapprehension has been corrected. The Board shall remain seized in the event that the calculation of the payments raises difficulties between the parties.

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**0726-84-R** Food and Service Workers of Canada, Applicant, v. **Federated Building Maintenance Company Limited** and Olympia & York Developments Limited, Respondents

Related Employer - Union holding bargaining rights for employees of cleaning subcontractor - Claiming subcontractor and customer related employers - Board reviewing applicability of related employer provision to subcontracting arrangements - Finding indicia and mischief of provision absent - Application dismissed

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *R. Wilson* and *A. Grant*.

**APPEARANCES:** *M. Cornish* and *W. Iler* for the applicant; *J. R. Hassel* and *M. Spankie* for the respondent Olympia & York Developments Limited; *B. M. Smeenk* and *E. J. Kavanagh* for the respondent Federated Building Maintenance Company Limited.

**DECISION OF THE BOARD;** November 29, 1985

1. This is an application under section 1(4) of the *Labour Relations Act*. The applicant union seeks a declaration that the respondents, Federated Building Maintenance Company Limited ("Federated") and Olympia & York Developments Limited ("O&Y") are one employer for the purposes of the *Labour Relations Act*. The result of such declaration would be that each of the respondents would become bound by the collective bargaining obligations of the other.

2. The facts are not in dispute. Indeed, at the suggestion of the Board, the parties met and eventually reached total agreement on the commercial and collective bargaining facts which, in their view, were arguably relevant to the application. The agreed statement of fact is supplemented by some 200 pages of collective and commercial agreements, memos, letters, and other documents relating to the respondents' business relationship. The salient features of the parties' agreement are set out below.

3. O&Y is a real estate development company which develops, owns, and manages large commercial projects. O&Y has an ownership interest in approximately 20 buildings and building complexes across Canada. One such building complex is First Canadian Place which includes two buildings: the First Bank Tower and the Exchange Tower. The First Bank Tower opened in 1975 and provides office space, *inter alia*, to the Bank of Montreal (hence its name). There is a somewhat different ownership structure for the *property* on which the Exchange Tower is located; however, O&Y is the owner of both *buildings*.

4. O&Y is not now, nor has it ever been, in the business of providing contract cleaning services for office or other large buildings. O&Y does not have any independent expertise in this area, and instead relies upon the expertise of subcontractors whom it retains from time to time. O&Y "contracts out" all of the cleaning services provided in its buildings in Canada and in the United States.

5. In order to manage commercial buildings of the size of the First Bank Tower and the Exchange Tower, O&Y must have a substantial presence on the premises. In fact, O&Y has its own head office there, and O&Y's own employees deal with such matters as tenant

concerns, parking, and security. For example, O&Y maintains a staff of 30 security officers reporting through their supervisors ultimately to Ronald Bond who is responsible for security procedures at all of O&Y's Canadian properties. These security officers are covered by a collective agreement between O&Y and the United Plant Guard Workers of America, Local 1962.

6. The maintenance and operation of the First Bank Tower (including shipping and receiving procedures) is supervised by O&Y managerial personnel. There are about 30 or 40 O&Y employees (plumbers, mechanics, equipment operators, engineers, etc.) engaged in these operational and maintenance functions. They are covered by a collective agreement between O&Y and the International Union of Operating Engineers, Local 796. Approximately 20 O&Y employees are engaged in shipping and receiving functions. They are also represented by the International Union of Operating Engineers, Local 796, but their collective agreement is different from the one covering the maintenance and operating employees. The maintenance and operation of the Exchange Tower has its own managerial superstructure and the O&Y employees working there are covered by yet another collective agreement between O&Y and the International Union of Operating Engineers, Local 796. In summary then, O&Y maintains a substantial employee complement at First Canadian Place, some of whom are represented by various trade unions and some of whom are not organized. There is no suggestion that Federated has ever had anything to do with O&Y's employees or collective bargaining relationships.

7. First Canadian Place has approximately 3,500,000 square feet of rentable space. O&Y, as landlord, has entered into various types of leases with its tenants. The actual form of any particular lease and, indeed, the standard form of lease may vary depending upon the size and type of tenant.

8. Retail tenants are obliged to arrange their own cleaning services. This cleaning may be arranged through Federated, through some other contractor, or might be done by the tenant itself - subject to the proviso that tenants engaging outside contractors or tradesmen must ensure that such outsiders conform to the rules established for the regulation of the use of public and private areas. Retail tenants occupy approximately 400,000 square feet in First Canadian Place.

9. The Bank of Montreal is a key tenant in the First Bank Tower, and has banking facilities in the main and concourse floors of First Canadian Place. The Bank of Montreal occupies approximately 600,000 square feet of space and cleans approximately 60,000 square feet on its own (presumably for security reasons). Federated cleans just over 3,000,000 of the 3.5 million square feet at First Canadian Place (i.e., about 85 per cent) pursuant to its contract with O&Y; however, tenants may also wish to make arrangements for extra cleaning which is either done through O&Y (which charges the management fee) or may be arranged by the tenant directly with Federated or some other cleaning subcontractor. The leases provide that any increases in cleaning costs (and other operating costs) during the currency of the lease will be assumed by the tenant. Certain tenants are also on net leases and therefore pay all of the costs in addition to rent.

10. As we have already mentioned, O&Y, as landlord of its 20 or so buildings in Canada, contracts out cleaning services to various subcontractors, none of whom have any corporate or other relationship with O&Y itself. O&Y has some flexibility in this regard because there is a competitive market. There are several large contractors in the business of



providing cleaning services for commercial buildings and there are also a great number of smaller contractors in the cleaning service business. Federated is one of the larger contractors and is in active competition with such firms as: Concorde Maintenance Ltd., Pritchard Building Services, Sanitary Maintenance Systems, Adelaide Maintenance, Consolidated Maintenance, and Action Building Cleaners. Some of these companies have the cleaning contracts at other O&Y buildings in Canada. The only relationship which O&Y has with Federated (through Federated's "Commercial Building Services" Division) is at First Canadian Place.

11. There is no doubt that O&Y has prepared a detailed schedule of its cleaning requirements to which all of its cleaning subcontractors, including Federated, must adhere. This schedule outlines the various office cleaning functions which must be performed (vacuuming carpets, dusting, polishing door kickplates, etc.) and the frequency with which such tasks should be performed (i.e., daily, weekly, etc.). The schedule of performance specifications was originally prepared in 1972 and revised from time to time thereafter. It is used at all of the larger buildings administered by O&Y (with any necessary modifications) and is the standard type of specifications required and generally followed in the industry.

12. Federated (through its predecessor and now division "Commercial") has held the contract to clean the First Bank Tower since the building opened in 1975. The contract is in the form of a one-page letter setting out the rate which O&Y agrees to pay Federated per square foot of cleanable space, to which is appended the cleaning services to be supplied by Federated. Federated obtained this contract after competitive bids were submitted by approximately nine other cleaning contractors. The contract has been renewed from time to time and was extended to the Exchange Tower when that building was completed in 1982.

13. Over the years, Federated and O&Y have negotiated increases to the original contract price. These increases typically took into consideration wage increases given by Federated to its employees. Such wage increases were in keeping with changes in wage rates paid to cleaners at large buildings in downtown Toronto and were forthcoming both before and after the establishment of a collective bargaining relationship with the applicant union. After the negotiation of Federated's first collective agreement, this established practice continued. For a number of years, Federated was able to persuade O&Y to increase in its contract price to accommodate the wage increases negotiated with the trade union.

14. Federated's business is labour intensive. The increases in contract price which Federated successfully negotiated with O&Y were directly related to the wage increase which Federated had granted to its employees or which, after 1980, Federated had negotiated with the trade union. However, the increased costs arising from the fringe benefits which Federated had agreed to provide its employees (such as sick leave, OHIP, bereavement leave, vacations and premium time) were not reflected in the increased rate which Federated negotiated with O&Y. These fringe benefit costs, therefore, had a direct impact on the profitability of the contract which Federated had with O&Y.

15. The most recent contract price was arrived at on a different basis and was concluded just prior to the most recent settlement between the union and Federated. The contract price was a firm one, and was more detailed than in previous years. It would not be affected by any settlement between Federated and the union. This cleaning contract was the first agreement negotiated with Malcolm Spankie, the senior vice-president of property administration (Canada) for O&Y.



16. As we have already noted, the commercial cleaning contract prescribes the services to be provided in considerable detail. However, in order to complete the picture and clarify the circumstances in which these functions are carried out, it is necessary to make some reference to the nature of the building itself.

17. Because of the size of First Canadian Place and the needs of its tenants, O&Y maintains fairly elaborate technical and security systems. The lights are controlled by computer and ensure that only certain portions of the premises are illuminated at any one time. This saves money, but also requires the cleaners working after 6:00 p.m. to clean floor areas in a predetermined pattern. A tenant, Federated employee or visiting tradesmen must call the building control centre to arrange for the lights to be on in the quadrant of a floor during periods of time when the lights would ordinarily be scheduled to be off. Similarly, Federated employees, tenants and visitors must conform to O&Y's rules respecting the use of elevators, since it is only by controlling access to those elevators that one can maintain the security of the tenants' premises. This involves identification, sign in, and security pass procedures which need not be elaborated here, save to note that Federated's employees must conform to the same kinds of controls as the tenants and their employees. The security system is maintained by employees of O&Y who also monitor the use of service elevators.

18. To this point we have focused primarily on the characteristics of O&Y, the nature of the work performed by Federated's employees, and the general circumstances in which that work is performed. We turn now to Federated, the nature of its business and its relationship with its own employees.

19. Federated has been in the business of cleaning office and institutional buildings since its incorporation in 1961. Its corporate ancestry and progeny need not be set out here, other than to note that it has never had any corporate relationship with O&Y (i.e., there are no common shareholders, directors, managers, financial advisors, accountants, lawyers, premises, principals, or backers). O&Y and Federated have always been run separately and have never been represented to the public as a single integrated enterprise.

20. Federated is effectively managed and controlled by Mr. Ted Kavanagh, its director. He has been involved with the maintenance and cleaning of major office buildings since 1956. Mr. Kavanagh has had an extensive business career, none of which involved any employment or consulting relationship with O&Y. Federated presently is party to over 20 contracts under which it is responsible for cleaning services in large office and institutional buildings across Canada. Federated employs approximately 1,500 employees, some of whom are unrepresented and some of whom are represented by trade unions other than the applicant. Federated has its head office at 100 University Avenue in Toronto, where its employees are screened and hired. Federated has its own employee relations policies and personnel.

21. O&Y is only one of Federated's "customers" - although obviously it is an important one. About 250 (17 per cent) of Federated's 1,500 employees work at First Canadian Place. The O&Y contract at First Canadian Place is Federated's largest in terms of both floor space to be cleaned and number of employees involved. The next largest is the Commerce Court complex in Toronto which, like First Canadian Place, also has in excess of 2,000,000 square feet of floor space. Federated has a significant investment in cleaning equipment and supplies used by its staff in order to fulfill its various contracts, as well as some considerable expertise ("human capital") based upon its many years in the cleaning service business.

22. Because of the size of First Canadian Place, and the number of its employees working there, Federated maintains a substantial complement of managerial personnel to oversee their activities. There are several layers of management. There is a day supervisor and a night supervisor who report to a "housekeeping manager". The housekeeping manager is responsible for hiring and supervising all Federated employees and discussing with O&Y any day-to-day matters involved with the cleaning of the premises or the concerns of the tenants.

23. The day supervisor, as his title suggests, is responsible for directly supervising approximately 25 or 30 Federated employees who work during regular business hours performing functions such as daytime cleanup in shopping areas and window cleaning. He must also deal with O&Y occasionally if tenants have specific requests or complaints. The night supervisor is responsible for managing the nightshift cleaners. He is responsible for handing out keys to the foreladies and giving any special instructions with respect to changes in procedure or extraordinary circumstances. He is also responsible for general inspection of the complex, hiring the employees working on his shift, assigning or reassigning employees to various floors, and making alternative staffing arrangements when employees do not report for work as scheduled. He is assisted by approximately ten foremen or foreladies who work on the evening shift and are each responsible for supervising cleaners on approximately ten building floors. The forepersons ensure that the cleaners have sufficient supplies to perform their jobs and inspect the work of the cleaners under their supervision. They too participate in ensuring sufficient coverage if a cleaner is absent. They assign such overtime work as may be required and if there is a recurring problem with a particular employee's work performance they bring it to the attention of the night supervisor who, in turn, brings the matter to the attention of the resident housekeeping manager. It is the housekeeping manager who determines whether any formal discipline is required - sometimes (in more serious cases) in consultation with Mr. Kavanagh.

24. Federated began hiring employees to work at First Canadian Place in April, 1975, soon after it obtained its first contract with O&Y. Federated has continued to hire its own employees since that time, and has determined their terms and conditions of employment. The employees are paid on cheques drawn by Federated. Save as outlined below, O&Y is not involved in hiring, supervising, disciplining or terminating employees of Federated or in directing their work or the manner in which it is performed. O&Y does not pay the employees, nor do they wear any emblems, uniforms or indicia indicating that they may be employees of O&Y. In fact, all such indicia, whether on uniforms or otherwise, indicate that the cleaners are employees of Federated. Discipline, discharges, promotions, transfers, bonuses or benefits are all determined by members of Federated's own management team. O&Y is not involved.

25. This is not to say that O&Y employees never interact with those of Federated, or that O&Y personnel are entirely unconcerned with the way in which Federated employees go about their tasks. Obviously O&Y will be concerned because, as landlord, it is likely to be the immediate recipient of any tenant complaints about inadequate performance on the part of Federated's cleaning staff. One would expect that O&Y would be a conduit to Federated for such complaints and, in its own interests, Federated would be expected to act upon such complaints if they were serious and substantiated. Furthermore, as we have already indicated, O&Y has established rules and regulations which impact upon Federated's employees, tenants,

the employees of tenants, and other persons, such as tradesmen or movers frequenting First Canadian Place. These rules have been in place since First Canadian Place opened and include: the regulation of the use of public areas or tenant areas for meals or breaks; the use of elevators reserved for tenants and their visitors; the removal of material, goods or belongings without written authorization; the operation of the lighting system; the reporting of damage, the co-ordination of garbage removal activities, the use of service elevators when tenants are moving in and out, and so on. It would be rather surprising if, in the course of almost ten years, there were not at least some problems or incidents of tenant dissatisfaction brought to Federated's attention by O&Y; but what is rather interesting about the agreed facts is the relative infrequency of such concerns and, more important, that the course of action recommended by O&Y (usually removal of the subject employee from the premises) did not always occur.

26. It is apparent that Federated has always maintained its right to deal with its employees in its own way and in accordance with its collective bargaining obligations. One theft incident did result in a discharge, but in two other cases aggrieved employees were returned to their former positions and in another instance the employee was transferred to another Federated work site. In yet another case, a tenant complained to O&Y that the cleaners were disconnecting electronic typewriters, thereby erasing their memories. This complaint was forwarded to O&Y which, in turn, brought the problem to the attention of Federated which issued letters of warning to the employees concerned. However, it is difficult to attach much significance to these incidents, given the relative infrequency of these problems, the natural interest of both O&Y and its tenants in controlling the activities of outsiders on their premises and the extent to which Federated appears to have maintained its own right to determine the appropriate employer response. Certainly nothing much turns on the fact that security guards employed by O&Y and represented by the United Plant Guard Workers of America, Local 1962, might find themselves giving evidence or making reports detrimental to the interests of an accused Federated employee. That, after all, is what they are hired to do. Their activities do not suggest that O&Y should be regarded as the employer, co-employer, or joint employer of Federated's employees - particularly since it is not at all unusual for security services themselves to be provided by an outside subcontractor.

27. To complete our overview of the facts, we turn now to Federated's collective bargaining relationship with the applicant union and the circumstances during the most recent round of negotiations which led to the instant proceeding.

28. The union was certified to represent the employees of Federated in October of 1979. The certificate and subsequent collective agreements based upon it are "site specific" - that is, they relate only to Federated's employees working at First Canadian Place. The union does not represent Federated employees working at other sites in Toronto (e.g. Commerce Court). If Federated should lose its contract at First Canadian Place, the union's bargaining rights would disappear. There was no suggestion at the time of certification that O&Y was a "related employer", nor could there have been without automatically creating a requirement to establish support among a much broader employee constituency encompassing employees of both employers. The union was content to take its certificate based on its support among Federated's employees only.

29. The first collective agreement was negotiated and came into effect on April 13, 1980. It remained in operation for a period of two years. A second collective agreement was



executed in 1982 for a further two-year term. Following a strike, a third collective agreement was negotiated for the period April 13, 1984 to April 12, 1986. At all three rounds of negotiations, Mr. Kavanagh was the spokesman for Federated. All collective bargaining decisions were made by Mr. Kavanagh who signed the various memoranda of settlement. An employee of O&Y, who was familiar with the building, attended a number of sessions at the first set of negotiations in 1979-1980 as a "resource person", however, he had no decision-making role and left the employ of O&Y soon after. After the first set of negotiations, O&Y has had no direct presence at the bargaining table - although obviously O&Y was interested in the outcome of negotiations because of the impact which a strike might have on its own operations and those of its tenants.

30. The most recent round of negotiations between the union and Federated started in January, 1984 and, following a strike, concluded with the signing of a memorandum of settlement on July 12, 1984. One of the union's reasons for filing this application was the apparent involvement of O&Y in the collective bargaining process. In this regard, the agreed statement of facts reads as follows:

44. The Union gave notice to bargain by letter dated January 17th, 1984 (Exhibit "U"). On or about the same date the Union circulated a flyer to employees describing what its demands would be (Exhibit "V"). Copies of this flyer were widely available and both Federated/Commercial and Olympia & York obtained copies of it.

45. On February 9th, 1984 Mr. Kavanagh met with Mr. Gringorten. During this meeting the two men discussed the Union's demands as set forth in the aforesaid flyer although the meeting was not for that purpose. Mr. Gringorten indicated that he had settled with the unions representing Olympia & York employees in the bargaining units for which he was responsible and had been able to obtain agreement based upon a wage freeze for all such bargaining units. He indicated that Mr. Kavanagh should therefore not expect any increase in his contract price which would reflect any increase in labour costs. Mr. Kavanagh asked Mr. Gringorten for a letter to that effect which he could then use during negotiations which were scheduled to commence the next day.

46. The first negotiation meeting was on February 10th, 1984. Mr. Kavanagh attended alone on behalf of Federated/Commercial. The Union negotiating committee presented its demands (Schedule W). In reply Mr. Kavanagh read Mr. Gringorten's letter of February 9th (Schedule "X"). He explained that if he agreed to the Union's demands he could easily price himself out of the contract for the First Canadian Place and would risk being replaced by another cleaning contractor who might submit a lower bid. Mr. Kavanagh stated that he was being dictated to by Olympia and York.

47. On or about February 10th, after the negotiating meeting, Mr. Kavanagh asked his supervisor Mr. Dias to talk to the employees. As a result a notice was posted by Mr. Dias (Schedule "Y"), to which an English translation is appended.

48. The second meeting between the Union and Federated/Commercial took place February 29th, 1984. At this meeting Mr. Kavanagh, who again was there representing Federated/Commercial, presented Federated/Commercial's counter proposal with respect to the various items contained in the Union's initial proposals tabled February 10th. With respect to wages Mr. Kavanagh indicated that Olympia & York was serious about not paying Federated/Commercial any increase for the following year, and accordingly Federated/Commercial was proposing a one year collective agreement with no wage increase.

49. On or about March 9th, 1984 at the third negotiating meeting, the Union indicated that it was applying for conciliation. At this meeting Federated/Commercial proposed a two year collective agreement, with a wage freeze in the first year and a five percent increase across



the board in the second year. Mr. Kavanagh indicated that he thought he could convince Olympia & York to give him a five percent increase in the second year of the collective agreement, because that was what Olympia & York had agreed to with the International Union of Operating Engineers.

50. On April 17th, 1984 the Union and Federated/Commercial met with Conciliation Officer Joe Poitras. Federated/Commercial reiterated its offer of no increase in the first year and a five percent increase in the second year. Mr. Kavanagh reiterated that he thought c] he could get Olympia & York to provide him with a five percent increase in respect of the second year, in view of the fact that Olympia & York had agreed to this with one of their unions. Extensive discussion and negotiations also took place with respect to other monetary and non-monetary issues (see the Union's summary of outstanding items dated April 17th, 1984 in Schedule "Z" and the Union proposal of 12:30 p.m. April 17th, 1984 in Schedule "AA"). The Union's monetary position at this time was a demand for a \$1.00 per hour increase in a one year collective agreement, or that it would "look at a proposal for a two year agreement if there are monetary improvements in the first year".

51. On May 16th, 1984 the Minister issued a "no Board" report.

52. Mr. Poitras convened a mediation meeting on May 30th, 1984. At that time the Union presented a revised proposal (Schedule "BB") which included a wage increase of 75 cents in the first year and a further 75 cents in the second year of a two year collective agreement, in addition to other improvements and benefits. Mr. Kavanagh replied to these proposals on behalf of Federated/Commercial. In his counter proposal, he proposed a wage freeze in the first year of a collective agreement and wage rates of \$6.12 per hour for light duty cleaners and \$7.32 per hour for heavy duty cleaners in the second year. The proposed increases in the second year equated to an average increase of five percent. In presenting his position Mr. Kavanagh stated that he felt confident he could live with a deal similar to that which Olympia & York had negotiated with one of its unions. He stated that if he priced himself too high, Olympia & York would put the cleaning contract out for tenders and he could lose the contract. He further stated that if there was any "labour trouble" at First Canadian Place, Olympia & York might get other contractors to perform the work. He cited an example of a cleaning contractor at the Eaton Center in Toronto which had lost a contract after tenders were called. A new contractor was retained and brought in an entirely new group of employees at lower wage rates, he stated. Mr. Kavanagh stated that there are no "succession rights" under such circumstances. He emphasized that he could lose his contract for First Canadian Place and the employees could lose their jobs if a reasonable settlement was not reached.

53. When mediation did not result in a settlement the Union called a strike scheduled to start June 4th, 1984. After Federated/Commercial had been advised on June 3rd that employees had voted in favour of a strike, Mr. Kavanagh spoke with Mr. Poitras by telephone and also participated in a telephone conference call with Mr. Poitras and Union representatives. During these conversations Mr. Kavanagh stated that he thought he would "get a hearing from Olympia and York" if a settlement could be reached at the five percent level. He stated that he would see what he could do to preclude a strike and would talk to Olympia and York.

54. In a later telephone conversation of June 3rd, Mr. Kavanagh changed Federated/Commercial's offer so as to make a 30 cent per hour (five percent) increase effective June 1, 1984 rather than January 1st, 1985 as previously offered. Mr. Kavanagh stated that Olympia & York would not increase his contract rate retroactively; that there was no chance of that occurring although he had not spoken to Olympia & York.

55. In yet another telephone conference on June 3rd, Mr. Kavanagh again improved Federated/Commercial's offer so as to make the 30 cent per hour increase effective April 13, 1984. He stated that since Federated/Commercial would not be able to get a retroactive increase from Olympia & York (indeed he had no assurance of an increase effective in June), this offer meant that Federated/Commercial would definitely be required to assume the cost of the retroactive portion of the increase. Mr. Kavanagh further stated that if the Union went on strike, there was a good chance that Federated/Commercial would lose the cleaning contract for First

Canadian Place, since Olympia & York might terminate the contract if there was any labour dispute (although Olympia & York had never said to Mr. Kavanagh this might happen).

56. At some point during that day, Mr. Spankie received a brief telephone call from Mr. Kavanagh advising of the status of negotiations. When it appeared that a strike was going to take place, Mr. Kavanagh telephoned Mr. Bond the evening of June 3rd to inform him that a strike was likely the next day and they discussed cleaning arrangements in the event of a strike. There had been no meeting regarding the negotiations between Olympia & York and Federated/Commercial since the February 9th meeting between Mr. Gringorten and Mr. Kavanagh except the topic of negotiations might have been raised at a "get reacquainted" lunch between Mr. Spankie and Mr. Kavanagh in April shortly after Mr. Spankie joined Olympia and York. Any telephone discussions between February 9th and June 3rd were to update Mr. Spankie on negotiations including the short telephone update referred to above. The information which Mr. Kavanagh provided Olympia & York was in general terms and he was optimistic at all times. Olympia & York was not involved in any plans for a possible strike.

57. Throughout negotiations, Mr. Kavanagh used Olympia & York's name and positions it might take without Olympia & York's knowledge or consent with the exception of the February 9th letter.

58. On or about June 8th, 1984 Mr. Spankie told the Toronto Star that "the hard fact of life is we have a contract (with Federated/Commercial owner Mr. Kavanagh) and any wage increases will come out of his hide unless we change that contract. If he goes down the tubes, everybody goes down with him".

59. All media contact by Olympia & York during the negotiations leading up to the strike by Federated/Commercial's employees or during the strike was initiated by the media. Olympia & York responded to such media enquiries by stating that Olympia & York was not involved in the labour relations of Federated/Commercial and was not involved in the dispute between Federated/Commercial and the Union and the employees of Federated/Commercial.

60. After the strike commenced, representatives of Olympia & York consulted with representatives of Federated/Commercial as necessary with respect to the security of the building, access and egress, vandalism, contacts with the police, and picket line incidents. Olympia & York took independent action to protect its property and tenants. Its security guards monitored the daily picketing activity to ensure tenant access and egress and security of property.

## DECISION

31. Despite the able submissions of counsel for the applicant union and the many authorities referred to, we do not think that the circumstances of this case raise any new principles, nor is it necessary to undertake any substantial review of the Board's developing jurisprudence. A good statement of the current state of the law can be found in J. Sack and C.M. Mitchell, *Ontario Labour Relations Board Law and Practice* (1985) at pp. 359-375, and such cases as: *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536; *Ethyl Canada Inc.*, [1982] OLRB Rep. July 998; *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060, and, most recently, *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923. The only novelty lies in the identity of the applicant: a union representing the employees of a subcontractor claiming (somewhat belatedly) that the subcontractor and its customer should be treated as one employer for labour relations purposes. Such claims are more commonly made when a unionized employer retains a subcontractor to perform work ordinarily done by its own employees and their union invokes section 1(4) to prevent an erosion of work opportunities.

32. We accept the union's proposition that section 1(4) may be broad enough to cover some of subcontracting arrangements - especially those which do not involve "contracting out" but which might more appropriately be described as "contracting in" or "labour only" subcontracting. Where "A" enters into a relationship with "B", whereby "B" comes into "A's" premises to perform functions to "A's" detailed specifications which were or might be undertaken by "A's" own employees, there will inevitably be something of a "symbiotic relationship" between the two business entities. Their activities will be complementary. They will necessarily be "related" in a general sense, and efficiency will usually require that there be some degree of co-ordination. Moreover, the more closely the purchaser of employee services controls when, where, how, by whom, and at what price the employee services are provided, the more the activities will appear to be under *joint control or direction*. If at the same time, the subcontractor is effectively dominated by the purchaser or it appears that the notion of a subcontract was introduced to provide a separate non-union corporate vehicle which permits the purchaser to have the same work performed in much the same way as before, but beyond the ambit of its collective agreement, the Board may well find that a section 1(4) declaration is warranted.

33. Section 1(4) permits the institutional rights of a trade union and the contractual rights of its members to attach to a definable commercial activity regardless of the particular legal vehicles through which that activity is carried on. Legal form or changes in form will not necessarily dictate, fragment, or undermine a collective bargaining structure. Two firms - quite separate in law - can be treated as one employer for collective bargaining purposes, and the union need not pursue the often difficult question of who would be "the real employer" applying common law tests. Moreover, if a particular commercial relationship falls within the ambit of the language of section 1(4) and the facts establish the mischief which section 1(4) was designed to avoid, it does not avail respondents to claim that they are separate companies with merely a "subcontracting" relationship. There is no magic in terminology. On the other hand, while many subcontracting arrangements might arguably fall within a literal reading of the language of section 1(4), we do not think the statute was ever intended to collapse the vast majority of bona fide subcontracting relationships. Section 1(4) is clearly discretionary, and should be applied only where there is clear evidence of the mischief it was intended to avoid.

34. From an analytical point of view, the circumstances of this case are really quite similar to those before the Board in *The Charming Hostess Inc.*, *supra*, *Ethyl Canada Inc.*, *supra*, and, more recently, *Caressant Care Nursing Home of Canada Limited.*, *supra*. In each of those cases, the Board found that the particular subcontracting arrangement under review did not trigger the application of section 1(4), even though the parties had a close commercial relationship. Indeed, if anything, the facts here present an even weaker case for a section 1(4) declaration.

35. It is clear on the facts that Federated is an independent business with its own established employee complement, operated for the benefit of its own principals, and providing its specialized services to a variety of purchasers of which O&Y is only one. There are no common principals, shareholders or financial supporters. There is separate management "from top to bottom", including at the First Canadian Place buildings. There are no common logos, solicitors, accountants, offices, or personnel. Each respondent conducts its own labour relations and both have collective agreements with various trade unions. On site, personnel matters are



dealt with by Federated - albeit, at times, when problems are brought to its attention by O&Y personnel, who, in turn, may be responding to tenant complaints. But those instances are few and relatively insignificant in the pattern of daily employer-employee relations; and, even where O&Y has sought to influence Federated, O&Y did not always get its own way. Federated maintained its employer prerogatives. Federated hires, fires, supervises, disciplines, pays and provides uniforms for its own workers, whether they work at First Canadian Place or elsewhere. Federated conducts its own collective bargaining with the applicant union at First Canadian Place and with other unions elsewhere. Obviously, Federated will have to take into account its competitors and the capacity of its customer to pay, and it may choose to adopt a collective bargaining posture emphasizing those themes; but that does not make O&Y the "real employer" of Federated's employees or warrant the invocation of section 1(4). There can be no confusion in the minds of the employees as to who their employer really is, nor was there any when the union sought certification in 1979, and in succeeding years negotiated several collective agreements directly with Federated.

36. O&Y has some 20 buildings and only one subcontracting relationship with Federated, while Federated has some 20 contracts, only one of which applies to an O&Y property. Both O&Y and Federated were in business before the First Canadian Place contracts, and, no doubt, they will continue even if that contract is terminated. Federated is not a mere shell or device to avoid collective bargaining obligations, nor can it be regarded as an instrumentality of O&Y. Its presence at First Canadian Place arises because it was the successful bidder and will remain so long as it is competitive with other cleaning subcontractors. Because there is considerable competition for the services which Federated supplies, O&Y may have considerable leverage, but this is no more than a customer would normally have in a favourable market and is not the kind of control which, in itself, would warrant a "related employer" declaration under section 1(4) of the Act. Nor do we think that much turns on the specificity of the cleaning contract. Detailed contracts of this kind are quite common in the industry, are necessary, given the size and complexity of O&Y's building, and, in any event, are not analytically different from the kind of detailed contracts found in other sectors of the economy (in the construction industry, for example). A degree of functional interdependence is inevitable, and implicit in many subcontracting arrangements. What is significant here is the absence of any other *indicia* of relatedness, or the mischief which section 1(4) was designed to prevent.

37. This is not a case in which an employer has shifted workers from one corporate vehicle to another, or where the union's bargaining rights have been undermined. There is no erosion in the sense of a transfer of work to the allegedly related employer. O&Y has never done its own cleaning. If Federated is no longer competitive, the work will go to another subcontractor, not employees of O&Y. If that happens, the union's bargaining rights will disappear, and the employees may have only limited rights to the work opportunities in other parts of Federated's organization; but that is the entirely foreseeable consequence of the union's decision to root its bargaining rights in a single work site, and a commercial relationship which is subject to the competitive pressure of market forces. Finally, there has been no fragmentation of an established bargaining structure of the kind which attracted comment in *Penmarkay Foods Limited* [1984] OLRB Rep. Sept. 1214. No new corporate vehicles have come into existence nor have O&Y and Federated changed the essential nature of their relationship. O&Y has merely pointed out that, in a period of restraint, it would not pay more than the "going rate" for services which could easily be provided by Federated's competitors - a message (undoubtedly true) which Federated passed on to its own employees.

38. If the Board were in any doubt as to the applicability of section 1(4) and the desirability of making a "related employer" declaration, such doubts disappear when one considers the effect which such declaration would have. *Prima facie*, O&Y and Federated would each become bound by the collective bargaining obligations of the other, including such obligations as there may be with unions other than the applicant. *Prima facie*, the unorganized workers of O&Y would be swept into the applicant's bargaining unit, and there would be an immediate conflict with the collective agreements of other unions. O&Y would find itself dealing with the applicant, and Federated would notionally become a party to O&Y's collective agreements. It may be that under section 1(4) the Board has the authority to "fine tune" its order so as to avoid such problems, however, in the circumstances of this case, we see little need to make any order at all. The facts simply do not disclose the circumstances or the mischief for which section 1(4) was the intended remedy.

39. We are unanimously of the view that this application should be dismissed.

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**1066-85-R; 1184-85-U** Teamsters Union Local No. 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **General Metal Products of Windsor Limited**, Respondent, v. Group of Employees, Objectors

**Certification Where Act Contravened - Discharge for Union Activity - Petition - Unfair Labour Practice - Discharge of union supporter and captive audience meeting - Management involvement in numerically irrelevant petition relevant to s. 8 application - Conditions met for certification without vote**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members W. H. Wightman and S. O'Flynn.

**APPEARANCES:** Ken Petryshen for the applicant/complainant; Leonard Lyons and Eugene Zgomba for the respondent; Steve Piskovic for the objectors.

**DECISION OF THE BOARD;** November 18, 1985

1. The name of the respondent is amended to read: "General Metal Products of Windsor Limited".

2. This is an application for certification in which the applicant requests that the Board apply the provisions of section 8 of the *Labour Relations Act*. The applicant also filed a complaint under section 89 of the Act alleging improper "layoff" of one employee, D. Hall. The parties agreed that both matters should be heard together. The Board hereby directs that the above application and complaint be and the same are hereby consolidated.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties reached agreement on the bargaining unit description. Having regard to that agreement, the Board finds that all employees of the respondent in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons who regularly work not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

5. In all, five witnesses testified: R. Dupuis and D. Hall for the applicant; B. Peach, B. Boudreau and E. Zgomba for the respondent. Zgomba is the owner; the other witnesses are employees, Hall being the employee whose "layoff" is contested. Both counsel raised the issue of credibility. The Board has assessed the credibility of the witnesses according to the usual criteria, namely, the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to express clearly their recollections, their demeanour while testifying, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered.

6. The Board has some specific comments about the witnesses. In the Board's view, the applicant's witnesses were candid and straightforward. In particular, Dupuis was an excellent witness who responded to questions with a forthrightness which made no attempt to distort responses even where the reply might be considered to favour the respondent. For example, Dupuis' assessment of Hall's work on the cutter was not couched in "glowing" terms but, rather, was a straightforward evaluation that Hall's progress was satisfactory. Dupuis also acknowledged he was a personal friend of LeBlang and on friendly terms with Legarry and Zgomba. In contrast, Zgomba was frequently evasive on cross-examination and did not respond to the questions actually asked. Further, some of the responses were just not believable. For example, Zgomba insisted his reaction on being informed with the certification application was that if the employees wanted the union, that was fine. However, this detached response just is not consistent with his admittedly highly agitated state during his conversation with Dupuis shortly after his return to the plant. Moreover, Zgomba stated he gave permission to LeBlang and Legarry to hold an employees' meeting during working hours on July 30th without asking how long the meeting would be, the purpose of the meeting or noting that the employees would not be paid for the time spent away from work. Such conduct is not consistent with an employer facing an allegedly serious shortage of work which would require the plant only operate for one shift and the layoff of one employee. Finally, Zgomba contradicted the testimony of other witnesses called by him with respect to key points, such as, the matters discussed at the meeting on Wednesday, July 31st. In that regard, the Board notes that the evidence of Dupuis and Peach regarding that Wednesday meeting was substantially the same. Thus, wherever there is a conflict in the testimony, the Board prefers the evidence of the applicant's witnesses.

7. Having weighed and assessed their testimony and the relative credibility in the context of the above, the Board makes the following findings of fact.

8. The respondent employs about 15 workers and manufactures machine bases. The manufacturing process requires a number of steps commencing with the torch cutting of large pieces of steel. There are two cutting machines and, hence, two employees can perform this operation on one shift. There were three employees working on cutting at the time of the



certification application: Dupuis, Boudreau and Hall. Dupuis had worked on cutting for some twenty months and was the most experienced. Boudreau also had considerable experience cutting and, as he preferred the afternoon shift, more often worked that time period. Hall had been hired in June 1985 as a welder. His training was in mig-welding while the employer's operations emphasized arc welding. Hall was transferred from welding after one month and worked as a cutter for approximately two weeks before his layoff. The Board deals with the circumstances leading to Hall's layoff in more detail *infra*.

9. Zgomba learned of the certification application through his wife's telephone call on Monday, July 29, 1985; he immediately returned to the plant. The Board comments here that Zgomba's wife is the company secretary. Zgomba's agitation increased with his perusal in the office area of the Board notice regarding the certification application. Zgomba proceeded to the plant floor, spoke briefly to LeBlang and then approached Dupuis at his work station. Zgomba asked Dupuis who was behind the union organizing and if Dupuis supported the union. Zgomba added that if the union got in, he would close down the plant. As noted above, the Board accept Dupuis' account of this conversation as the only account consistent with Zgomba's actions and agitated state. Dupuis replied that he had only heard some general union talk and referred to a person no longer an employee. Dupuis said he would see what he could find out, whereupon Zgomba left.

10. The Board notices were posted on that Monday. Later that day, LeBlang also approached Dupuis while the latter was working and asked if Dupuis knew who had started the union and if Dupuis had signed a card. Dupuis responded that he was trying to find out what was going on. LeBlang then briefly stated his negative views of unions. As well, LeBlang asked Hall if the latter had signed a union card; Hall replied in the affirmative. (Hall later relayed this incident to Dupuis who replied that Hall should say nothing more about his support for the union, that he had already said too much.) It is here appropriate to comment on the status of LeBlang and Legarry. The applicant conceded that both were members of the bargaining unit. However, the applicant asserted that both are regarded by the other employees as senior and closely related to management. It was not disputed that both were long service employees to whom the other employees turned for assistance with various problems. The Board finds that both held positions akin to "lead hands", i.e., as persons in the bargaining unit but who perform some supervisory-type functions, Legarry with respect to the machine shop and LeBlang in fabrication.

11. The following day, Tuesday, the employees were told by LeBlang in the early afternoon that they were to attend a meeting at 3:30 p.m. The Board notes that the shift hours varied somewhat but, at the time, the day shift was 7:00 a.m. to 4:30 p.m. and the afternoon shift commenced at 4:30 p.m. LeBlang and Legarry were given permission by Zgomba to hold the meeting on company premises during working hours. The Board finds that Zgomba knew full well the purpose of the meeting was to solicit employee grievances in an effort to stop the certification of the union. The first meeting was held in the company's lunchroom from 3:30 p.m. to approximately 4:15 p.m. and the employees of the afternoon shift were told as they arrived by LeBlang that there would be another meeting for that group too. It was not disputed that this was the first such meeting held at the plant; all others had been conducted by Zgomba.

12. The first meeting was attended by all production employees. LeBlang and Legarry were in charge of the meeting, although the former did most of the talking. LeBlang started

the meeting by stating that this was the employees' chance to voice their grievances and that the complaints would be passed along to Zgomba. Negative comments were made about unions in general. The employees were asked why they wanted the union and employee grievances were solicited. LeBlang wrote down the complaints, including: "housekeeping" (e.g., condition of the crane, clutter in the shop); right to refuse overtime; a standardized work week; complaints about S. Pablo (a supervisor); shift premium. Several of the complaints were raised by Hall. The "petition" was distributed and the employees directed to complete the forms and return the envelopes the next morning. Following the meeting, Hall was told by Pablo of his immediate layoff; Hall relayed this news to employees still in the lunchroom, including Dupuis. Finally, the Board notes that all employees were told late Tuesday afternoon that the plant, which had operated on bi-weekly rotating shifts since roughly December 1984, was returning to a one shift schedule. (The plant has continued on one shift since then.)

13. Tuesday evening, LeBlang telephoned Dupuis. LeBlang stated that Zgomba had been given the list of employees' complaints and had promised to follow up on them. For example, Zgomba had agreed at once to a shift premium. As well, LeBlang told Dupuis that he (Dupuis) had been chosen to hold the employees' petition forms the next morning. That evening, Dupuis also called Legarry about Hall's layoff. Legarry said he didn't know the reason for the layoff but otherwise confirmed LeBlang's comments about Zgomba's view of the employees' grievances. Dupuis had asked LeBlang about the layoff. LeBlang had commented that Hall was a poor welder and, as the company was moving to one shift, Hall was not needed.

14. Zgomba called a meeting of all employees on Wednesday morning, July 31st. The meeting lasted over an hour and employees were paid for attending. Zgomba had been given a report of the Tuesday meeting by LeBlang and Legarry. The Board rejects Zgomba's characterization of the report of the list of grievances as primarily raising "safety" concerns, in view of the topics on the list itself and the accounts of the meeting on Tuesday. Zgomba reviewed each item on the list compiled by LeBlang and asked LeBlang for clarification of some of the points. Zgomba insisted at the hearing that he did not have LeBlang's list but read from the company's "regulations and policies". However, the Board accepts the testimony of the union's witnesses and one witness called by the respondent that Zgomba indeed had LeBlang's list. Moreover, the Board notes Zgomba declined to file with the Board the "regulations and policies" allegedly read from. Zgomba agreed to virtually all the employees' requests but also stated that implementation had to wait until the certification application was resolved. Further, Zgomba made several negative comments about unions and added that, if the union was certified, all employees would have to be classified (by Zgomba) to determine their wage rate. Dupuis' statement that there were employees who were not "journeymen" and thus who would not receive that rate if a classification scheme was introduced was not challenged by the respondent. It is not necessary for the Board to recount all of the items on LeBlang's list which Zgomba dealt with, although the Board notes that the most thorough account of Zgomba's review of the employees' grievances was from one of the respondent's witnesses. Indeed, according to that witness, Zgomba stated openly "I don't care how you guys vote, it is up to you", thereby clearly revealing Zgomba's knowledge of the petitions. At the conclusion of the meeting Zgomba left and the employees handed the petition forms to LeBlang who then gave the envelopes to Dupuis. Some employees filled out petition forms after the meeting.

15. While it was not disputed that Zgomba had called meetings in the past, the Board finds that such meetings were scheduled after the day shift ended and were not held on a regular monthly basis. In fact, the last meeting occurred at least two months previously.



16. On August 15th, (the first hearing date was August 16th) Zgomba informed the employees that they would not be paid for the meeting on Tuesday, July 30th, although the pay cheques for that period had already issued. The Board notes in passing that, in a letter dated August 13th addressed to the Board, Zgomba stated that the employees were paid in error for that meeting and would have their next pay docked an equivalent amount. Later on the 15th, however, Zgomba reversed that position and told the employees they would be paid for that time.

17. It is useful to deal at this point with the petitions filed with the Board. On the Tuesday, LeBlang and Legarry were observed going in and out of the office with the petitions. LeBlang was also observed going directly from the office to the first meeting on Tuesday, July 30th, with the petition forms. It was not disputed that the petition forms were typed by Zgomba's wife in the office. As already noted, the petitions were distributed at the Tuesday meeting and collected the next day. Each employee was given a typed paper indicating opposition to the union. The employee was to fill in his name, place the paper in the envelope and return the sealed envelope. Also as noted, the petition forms were collected after the Wednesday meeting and given to LeBlang and then Dupuis. Another employee, S. Piskovic, gave Dupuis an addressed envelope for the petitions; the individual petitions, each in a sealed envelope, were sealed in that large envelope. Piskovic returned with a new envelope a few moments later as the covering letter for the petitions had not been enclosed. The employees' envelopes were then placed in the new envelope by Dupuis. Piskovic returned to the office with the sealed envelope. Shortly thereafter, Zgomba pinned a Registered Mail receipt on the bulletin board in the lunchroom.

18. It is appropriate to here briefly set out the circumstances leading to Hall's layoff. As noted, Hall was hired in June 1985 as a welder and transferred to cutting. Zgomba told Hall that another cutter was needed and, if Hall worked out, he would stay there. On July 30th, Pablo handed Hall a letter dated July 5th indicating that the reason for the transfer was Hall's poor performance as a welder. Dupuis was informed that Hall was being transferred as his welding was not up to par and the cutting area was falling behind. Dupuis asked that he train Hall and the shifts were scheduled to accommodate this; Dupuis had trained two other employees as cutters previously. In Dupuis' view, Hall's progress was satisfactory: the quality of the pieces cut was good; Hall's speed was slow but that was to be expected given his limited experience on the machine. Dupuis informed Zgomba directly on July 26th of his evaluation of Hall. On Saturday, July 27th, Zgomba told Hall that his cutting was good but, as his work was too slow, he would be given another week to improve production. On that Saturday, also, Boudreau indicated to Zgomba that, in his view, Hall was a poor cutter and particularly slow. However, that opinion was based only on the observations that day, as, except for an occasional shift overlap where Hall remained on the cutting machine, Boudreau and Hall worked different shifts. Thus, the Board relies on Dupuis' assessment of Hall's progress.

19. Dupuis testified that there was considerable cutting work available during the week commencing July 29th, including a large order and several smaller jobs. Testimony that the amount of overtime worked in the period prior to the certification application was considerable was not challenged. Indeed, both Hall and Bourdeau worked overtime on Saturday, July 27th. Although there were only two machines, occasionally the three cutters would be working at the same time. At these times, the third man (usually Hall) would weld, grind, paint, move steel, clean-up, etc. These regular "overlap" periods between the shifts ended when the day shift was reduced to nine hours from ten and ended at 4:30 p.m. rather than 5:30 p.m.



20. Again as noted earlier, Hall informed LeBlang on July 29th that he had signed a union card and Hall attended the Tuesday meeting where he voiced some complaints. Immediately after that meeting, Hall was directed by Pablo to report to the office whereupon Pablo told Hall of the layoff. Pablo commented that Hall was being laid off because he had been given a fair trial but was not qualified. It was not disputed that the separation slip indicated the layoff was because of "shortage of work". It should also be noted that Zgomba stated he had decided to layoff Hall on the 27th or 28th but waited until Tuesday when the part-time bookkeeper would be at work to prepare the papers. The Board comments further about Hall's layoff infra at paragraph 27.

21. Counsel for the applicant asserted that the evidence of the union witnesses should be preferred and, in particular, Zgomba lacked credibility. With respect to the "layoff" of Hall, counsel submitted that the respondent had not met the onus of proving the decision was without anti-union animus. Counsel emphasized that Pablo, the individual who actually laid off Hall, was not called as a witness. It was argued that, as Hall had told LeBlang that he had signed a union card, it was reasonable in the circumstances to infer that Zgomba learned of this. That is, the timing of the move to one shift, the layoff of Hall and the union certification application was too close to be accepted as coincidence. In the alternative, even if the layoff was without anti-union animus, counsel asserted the shift change was a violation of section 79 and, given the severity of the impact on Hall, he should be reinstated. It was also stated that Zgomba's explanation for the move to one shift was not credible and unsupported by documentary evidence of a decline in work orders. With respect to the requested certification pursuant to section 8, counsel argued the required element of a violation of the Act was established in Hall's "layoff" and the threats to job security by Zgomba in the conversation with Dupuis. Further, counsel pointed to the Tuesday meeting of employees conducted by LeBlang and Legarry and the Wednesday meeting of Zgomba as improper. Counsel asserted the union had sufficient membership support to satisfy that element in section 8 certifications. Finally, it was argued that, in such a small operation, the effect of the layoff and meetings meant that the true wishes of employees would not be revealed in a representation vote. Counsel pointed to the testimony of Dupuis' current isolation from other employees and the changed atmosphere in the shop as further indication that a vote would not be appropriate. In summary, counsel argued that Hall should be reinstated with compensation and the applicant certified. Counsel referred to several cases in support: *Benwind Industries*, [1985] OLRB Rep. Feb. 149; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *Elbertson Industries Limited*, [1984] OLRB Rep. Nov. 1564.

22. Counsel for the respondent submitted the employer's witnesses were credible. Counsel argued Hall was properly dismissed because he was unqualified (both as a welder and as a cutter) and he was not needed on a one shift operation. The change to a one shift operation, it was stated, was based on concern for security because of break-ins, the decline in work orders and the desire to respond to the employees' preference for one shift. Counsel argued the petition was a voluntary secret ballot and should be given weight. It was submitted that there was nothing improper in the various meetings, nor had there been intimidation or coercion by the employer. Rather, all decisions were based on good business practice. Thus, counsel requested that a representation vote be conducted. No Board jurisprudence was referred to in support.

23. The representative of the employee objector stated that relations with management

had always been good but, since the union applied for certification, the employees were not even working a regular eight hour day, let alone overtime. The representative agreed with the layoff of Hall and contested the negative testimony concerning Zgomba. Finally, the representative supported the ordering of a representation vote on the ground that he thought 70% to 80% of those who had signed union cards now opposed the union.

24. It is appropriate to first examine the petitions filed with the Board. Apart from the section 8 request for certification, the Board would not normally deal further with the petition as the membership support for the applicant is at a level where a representation vote is required pursuant to section 7(2) of the Act. That is, the effect of a petition, even if proved voluntary, is no more than to persuade the Board to direct a representation vote. However, because of the applicant's request for certification without a representation vote, the circumstances of the petition are indeed relevant. Firstly, the Board notes that it is not disputed that the employees individually marked and sealed their "ballots" (i.e., the petition forms). Accordingly, no evidence was put before the Board as to the circumstances in which each signature was obtained and, thus, there can be no finding of "voluntariness" on this ground alone: *Trench Electric*, [1976] OLRB Rep. Apr. 163, 167 upheld 76 CLLC 14,041 (Ont. Div. Ct.). There was, however, considerable evidence with respect to the circumstances surrounding the petition from several witnesses. It was not disputed that the petition forms were typed by the employer's wife in the company office. Nor was it disputed that LeBlang and Legarry took the "ballots" from the office area to the Tuesday meeting for distribution, collected the petition forms after the Wednesday meeting to be placed in an envelope with a cover letter also typed in the office by Zgomba's wife and, then, mailed to the Board. Zgomba's wife knew of the certification application and of her husband's reaction to the Board notice; she cannot be regarded as "innocent bystander" with respect to the petitions. Zgomba granted LeBlang and Legarry permission to hold a first ever employees' meeting for the purpose of organizing opposition to the union. Zgomba knew the purpose of the meeting and supported that goal, as is apparent from his discussion subsequent to the Tuesday meeting with LeBlang and Legarry and his review of the employees' complaints on Wednesday. These factors alone constitute overt management involvement in the petitions and render them involuntary: *Apple Bee Shirts Ltd.*, [1983] OLRB Rep. June 835; *DI-AL Construction Ltd.*, [1982] OLRB Rep. Dec. 1822; *Irwin Toy*, [1971] OLRB Rep. Feb. 52.

25. The respondent strenuously argued the "ballot" was "secret" and could have resulted in support for the union. In fact, the wording of the "ballot" is restricted to the signer indicating *opposition* to the union. A union supporter would have to refuse to return a ballot (and risk this fact being known) *or* return a sealed blank ballot or "revised" ballot (with still no security that this fact would not be revealed). Moreover, the "voting" was conducted in circumstances where an unambiguous message as to the employer's preference was being broadcast. Firstly, there is the factual finding that Zgomba questioned at least LeBlang and Dupuis as to whether they signed a union card. LeBlang also questioned Hall as to his support for the union and learned that the latter, in fact, had signed a card. It is likely that other employees were also questioned directly or at least learned that the employer was interested in discovering who of his employees had signed cards. Secondly, there is the Tuesday meeting on company premises during working hours and for which the employees were paid. The Board rejects the respondent's assertion that payment for attendance was unintentional as not credible in the circumstances. LeBlang and Legarry solicited employees' grievances on the understanding that the complaints would be passed to Zgomba. The Board also notes that neither LeBlang nor Legarry, both principal actors, testified at the hearing as to their conduct



and conversations throughout this period. There can be little doubt the employees realized that LeBlang and Legarry had the support of their employer in their endeavour, following the solicitation of complaints, of distributing a petition in opposition to the union. These factors, taken together, would also render the petitions involuntary on the basis of a reasonable perception of management involvement: *F. W. Woolworth Co.Ltd.*, [1982] OLRB Rep. May 797; *Dad's Cookies*, [1976] OLRB Rep. Sept. 545; *Burlington Northern Air Freight Canada Ltd.*, Board File No. 1198-84-R, Nov. 15, 1984 unreported; *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813; *Pigott Motors (1961) Ltd.*, 63 CLLC 16,264; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387.

26. Matters did not end there, however. Directly after the Tuesday meeting, Hall was "laid off" and the employees learned of this. In the Board's view, and the respondent did not assert otherwise, while the matter was characterized as a lay-off, Hall was discharged. The impact on the other employees of the discharge of a fellow employee who had informed an individual regarded as close to management of his union support and had spoken out at the Tuesday meeting must be taken to have a considerable chilling effect. The following day, Wednesday, Zgomba held what must be regarded as a "captive audience" meeting where the employees grievances were reviewed and granted - but not to be implemented until after the certification application was resolved. No employee could miss the message that future benefits depended upon supporting their employer against the union. That captive audience meetings have negative consequences for the voluntariness of a petition has been noted in a number of Board cases, including: *Dylex Limited*, [1977] OLRB Rep. June 357; *Delft Blue Farms Incorporated*, [1985] OLRB Rep. July 1013, and the cases cited therein; *Benwind Industries*, *supra*; *Manor Cleaners Limited*, *supra*.

27. The Board next examines the discharge of Hall. The respondent bears the onus of demonstrating that the discharge was entirely free of anti-union animus. It is useful to refer to the standard enunciated in the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745:

Given the requirement that there be absolutely no anti-union motivation, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only ones and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

The Board finds that the respondent has not satisfied this onus. The discharge of Hall was allegedly based on Hall's lack of qualifications to perform the work and the change to a one shift operation which purported to make Hall surplus. Firstly, it is not clear that Hall was not qualified to perform the cutting work. Dupuis' assessment indicated that Hall's progress was satisfactory. Even Zgomba's conversation with Hall on the Saturday only focused upon the need for increased speed. That conversation also referred to a further one week trial period to improve the production rate but Hall was discharged only two days into that week. The other ground for Hall's discharge requires review of the change to one shift. The respondent had operated on two shifts since December 1984 to January 1985. Overtime was frequent and, indeed, both Hall and Boudreau worked overtime the Saturday before the Board notices arrived. It would require compelling documentary evidence to justify such a significant change in operations in view of the overwhelming coincidence of that timing with the notice of the certification application. No documentary evidence whatsoever was produced to the Board. Indeed, the respondent declined to submit even the company "regulations and policies" allegedly read from at the Wednesday meeting. The Board does not regard the break-ins as



a significant factor in the decision to move to one shift given the time lapse since those events. To the extent the shift change was intended to respond to the employees' wishes, the change was improper in view of the timing. That is, the employees had generally disliked the second shift for a number of months; responding to the employees' concerns at that point was an attempt to defeat the union certification application. Returning to Hall, the Board has found that Hall told LeBlang that he had signed a union card and that Zgomba undoubtedly became aware of this fact. Further, Hall actively participated in the Tuesday meeting with respect to voicing employees' complaints. Thus, the Board finds that Hall's discharge was not free from anti-union animus and contravened section 66 of the Act: see also *Charterways Transportation Ltd.*, [1982] OLRB Rep. Jan. 5; *Benwind Industries*, *supra*.

28. The Board now turns to the applicant's request for certification pursuant to section 8 of the Act. Section 8 reads:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union had membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

29. The Board in *DI-AL Construction Limited*, [1983] OLRB Rep. March 356 at 358 stated:

... certification pursuant to the provisions of section 8 of the Act was designed as both deterrent to illegal employer interference in union organizational campaigns, as well as a device to provide a meaningful and effective remedy in those areas where an employer's interference has operated to destroy the free selection process guaranteed by section 3 of the Act. The wording of the section makes clear that certification under section 8 can only be granted if three conditions are satisfied, namely:

- (i) The Act has been violated.
- (ii) The true wishes of employees are not likely to be ascertained in a representation vote, or otherwise.
- (iii) In the opinion of the Board, the applicant has membership support adequate for the purposes of collective bargaining.

30. The applicant has established the first condition necessary for certification pursuant to section 8. That is, the Board has found that the discharge of Hall, the employer's involvement in the petition and the captive audience meeting contravene sections 64, 66 and 70 of the Act.

31. The Board next examines the membership support enjoyed by the applicant. A total of 8 membership cards were filed in respect of 16 employees in the bargaining unit for purposes of the count. As noted, the applicant is in a vote position, that is, a representation vote is required under section 7(2) of the Act. However, certification without a vote, pursuant to section 8, is the alternative sought by the applicant.

32. It is useful to refer to a relevant passage in *Manor Cleaners Limited*, *supra*, at this point:

21. The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

Some of the circumstances or factors which have been considered by the Board in assessing 'adequacy' are:

- (1) the stage of the union's campaign at which the employer conduct occurred (*Skyline Hotel Limited*, *supra*; *District of Algoma Home for the Aged (Algoma Manor)*, *supra*);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed - 'the chilling effect' (*K-Mart*, [1981] OLRB Rep. Jan. 60.);
- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Somerville Belkin*, *supra*).

In assessing adequacy, the Board must engage in some measure of speculation regarding the union's prospects of successfully engaging in the sequel to certification, collective bargaining. If the union can and has mastered the totality of its support in the bargaining unit, certification under section 8 should not be used to foist union representation on those employees who would not have chosen this freely for themselves. The assessment must be taken with care (see *Skyline*, *supra*, at paragraph 62).

33. Certification pursuant to section 8 does not require majority support. In the Board's view, the applicant has demonstrated a significant degree of support within the bargaining unit, at least sufficient to engage in meaningful collective bargaining. That is, the applicant has satisfied the third element set out in paragraph 29, *supra*.

34. The Board now considers the second requisite element for certification, namely, whether the true wishes of the employees are likely to be ascertained in a representation vote. The Board deals with this element last because the applicant already is in a "vote" position and the Board must be persuaded that a vote should not be ordered. Substantial employer misconduct is required to justify this extraordinary remedy of certification pursuant to section 8: *Radio Shack*, [1979] OLRB Rep. Mar. 248, upheld 79 CLLC 14,316 (Ont. Div. Ct.); *Ex-Cello Wildex Canada*, [1977] OLRB Rep. June 370; *Benwind Industries*, *supra*; *Manor Cleaners*, *supra*. The Board, however, does look to the cumulative impact of the employer's improper activities: *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60; *Robin Hood Multi-Foods Inc.*, [1981] OLRB Rep. July 972; *Benwind Industries*, *supra*. In this case, there was the discharge of Hall, improper interference in the "petition" and a captive

audience meeting at which there were open inducements (shift premium, settlement of grievances) to employees not to support the union. As well, the Board must determine whether the remedies which could be directed with respect to violations of the Act would effectively “restore the atmosphere” to the point where the union could continue to conduct its campaign, as an alternative to certification under section 8. In this regard, the Board notes the testimony that the atmosphere in the shop has changed markedly since the certification application and the first Board hearing. For example, other employees are afraid to talk openly with Dupuis, now a known union supporter. In the words of one of the respondent’s witnesses, the employees are trying to “lie low” until this is resolved. The Board also notes that this is a small shop and, consequently, the chilling effect of the improper employer conduct is that much greater. In light of all the circumstances, then, the Board concludes that the true wishes of the employees are not likely to be ascertained in a representation vote.

35. The applicant, thus, has satisfied all the required elements in a section 8 application. The Board, for the foregoing reasons, exercises its discretion pursuant to section 8 of the Act and certifies the applicant as bargaining agent for:

all employees of the respondent in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons who regularly work not more than twenty-four (24) hours per week and students employed during the school vacation period.

36. A certificate shall issue to the applicant.

37. The Board has found the respondent to have contravened sections 64, 66 and 70 of the Act. The Board does not regard it as necessary to deal specifically with section 79. In devising an appropriate remedy, the Board notes that the plant has continued to operate on one shift and no new employees have been hired since Hall was discharged. The Board sees no compelling reason at this point to alter the single shift operation. The Board recognizes that only two cutters can operate the machinery during one shift. However, in the Board’s view, it has not been established that there is insufficient work to occupy Hall. As noted, Hall performed a number of duties besides cutting, including grinding, welding, painting, etc. Moreover, Hall was neither the most junior employee or even the most junior welder. As the Board has found Hall’s termination to be in violation of the Act, he must be reinstated as set out below.

38. Consequently, the Board orders:

- (a) that the respondent sign and post copies of the attached Notice marked “Appendix”, as supplied by the Board, in conspicuous places on its premises and to keep such notices posted for sixty (60) working days and to take all reasonable steps to ensure that the Notices are not altered or defaced or covered by any other material;
- (b) that the respondent provide reasonable access to a representative of the applicant to permit the applicant to satisfy itself that the respondent has complied with this posting order;
- (c) that the respondent give two representatives of the applicant an opportunity to hold two separate meetings, the first of which will occur within the two weeks of the receipt of this decision or at a time satisfactory to the applicant, with all employees, without loss of pay, on the respondent’s premises during working hours but without the presence of any member of management. Each of these meetings may be as much as one hour in length. The second meeting will be held in the same fashion at a time satisfactory to the



applicant. The respondent is further directed to require all employees to attend such meetings;

- (d) that the respondent, for one year from the date of this decision or until a first collective agreement is reached, whichever occurs first, give reasonable notice to the applicant and permit access to the applicant to any future meeting of the employees sponsored by or called by the respondent which involves a discussion relating to collective bargaining with equal time to be afforded the applicant's representatives to respond;
- (e) that the respondent offer to reinstate forthwith D. Hall and that the respondent compensate him for loss of credited service, wages and benefits, from the date of termination, less earnings during that period;
- (f) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner prescribed in Practice Note 13, dated September 8, 1980.

39. The Board shall remain seized to resolve any dispute as to the implementation of these orders.

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## Appendix

# The Labour Relations Act

# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAY OFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL PROVIDE REPRESENTATIVES OF TEAMSTERS UNION LOCAL NO. 880 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ACCESS TO OUR PREMISES DURING WORKING HOURS FOR THE PURPOSE OF CONDUCTING TWO SEPARATE MEETINGS OF THE EMPLOYEES IN THE BARGAINING UNIT OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT.

WE WILL FOR ONE YEAR OR UNTIL A FIRST COLLECTIVE AGREEMENT IS REACHED, WHICHEVER OCCURS FIRST, PROVIDE REPRESENTATIVES OF THE TEAMSTERS UNION LOCAL NO. 880 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ACCESS, WITH REASONABLE NOTICE BEFOREHAND, TO ANY MEETING OF EMPLOYEES SPONSORED BY US WHICH INVOLVES THE DISCUSSION OF THE PROS AND CONS OF COLLECTIVE BARGAINING, WITH EQUAL TIME TO BE AFFORDED THE UNION REPRESENTATIVES TO RESPOND.

GENERAL METAL PRODUCTS OF WINDSOR LIMITED

PER:

(AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced**

**This notice must remain posted for 60 consecutive working days.**

**1038-85-U Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Complainant, v. Honest Ed's Limited, Respondent**

**Discharge for Union Activity - Unfair Labour Practice - Employer establishing genuine concerns about grievor's absenteeism and punctuality - Existence of cause to terminate not complete defence - Board finding union activity also reason for discharge**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *F. C. Burnet* and *P. J. O'Keefe*.

**APPEARANCES:** *David I. Bloom*, *Ron MacNeil*, *Danny Moretto* and *Loretta May* for the complainant; *S. A. Bernofsky*, *Rolf Carston* and *Russell Lazar* for the respondent.

**DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN AND BOARD MEMBER P. J. O'KEEFE; November 29, 1985**

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent terminated the employment of Ron MacNeil contrary to the Act.

2. Mr. MacNeil had been employed by the respondent from September 1980 to November 1981, and became employed by the respondent again in November 1984 until his discharge on Tuesday, July 16, 1985. Mr. MacNeil worked in the respondent's shoe department as a sales clerk during his most recent period of employment. Dominic Pironcelli, a buyer, was responsible for the management of the shoe department and was the person who decided to discharge Mr. MacNeil.

3. Mr. Pironcelli testified that Mr. MacNeil was, at best, a fair employee, who had a drinking problem. Mr. MacNeil had been warned many times about his attendance, punctuality, appearance and attitude, both orally and in writing. Although Mr. MacNeil disputed some of the details of those written warnings, he did concede that while he thought he was a fairly good employee, he had some problems with absenteeism and punctuality. Mr. MacNeil also admitted that he had had a drinking problem, but that he had improved and had stopped drinking in mid-May of 1985.

4. Mr. MacNeil was scheduled to be at work on Saturday, July 13, 1985. Shortly after 9 a.m. on that Saturday, Mr. MacNeil called the respondent to inform it that he would not be in to work. Mr. Pironcelli recollected that he spoke with Mr. MacNeil, who told him that he was not feeling well. Mr. Pironcelli told Mr. MacNeil to stay home, relax and get well. Mr. MacNeil testified that he called the respondent shortly after 9 a.m. and believed that he spoke with Bobby Sheridan, a supervisor in the shoe department. Mr. MacNeil did not report for work that day. However, at about 4 p.m. that afternoon, Mr. Pironcelli saw Mr. MacNeil outside the respondent's premises. Mr. Pironcelli did not confront Mr. MacNeil at that time, but decided in his own mind that Mr. MacNeil had taken advantage of him and the respondent once too often. Mr. Pironcelli explained that when he saw Mr. MacNeil outside the respondent's store on the same day that he was supposed to have been too ill to come to work, Mr. Pironcelli felt that Mr. MacNeil was being unfair to him, the respondent and the other employees in the shoe department.

5. Although Mr. Pironcelli decided on Saturday that he would discharge Mr. MacNeil,



he did not speak to Mr. MacNeil about his absence on Saturday or the next working day, which was Monday, July 15. Mr. MacNeil worked a previously scheduled 12 hour shift, 9 a.m. to 9 p.m. on that Monday. On Tuesday, July 16, Mr. MacNeil was scheduled to work from noon to 9 p.m. Shortly after Mr. MacNeil arrived at work on that Tuesday, he met with Mr. Pironcelli. Mr. Pironcelli informed Mr. MacNeil that he he was being terminated because of his absence on Saturday, and his previous poor punctuality and attendance.

6. Mr. MacNeil had been active in the complainant since about March of 1985. The complainant was in the midst of an organizing campaign among the respondent's employees at the times relevant to this proceeding. Mr. MacNeil had occasionally distributed leaflets to the respondent's employees outside of the respondent's premises promoting the complainant. He had also been visiting employees in their homes on Sundays, trying to enlist support for the complainant. Mr. Pironcelli was aware of Mr. MacNeil's active role in the complainant, and had known that he was a supporter of the complainant as early as December, 1984, when Mr. MacNeil went to Mr. Pironcelli wearing a button showing support for the complainant and advising Mr. Pironcelli that he had joined the complainant. Mr. Pironcelli responded at that time by telling Mr. MacNeil that it was up to him as to what church or groups he affiliated with. Mr. Pironcelli never spoke to Mr. MacNeil about the complainant after that time.

7. Mr. MacNeil testified that on Friday, July 12, when he was not scheduled to be at work, he went to the respondent's store and was campaigning for the complainant and canvassing employees outside of the respondent's premises. He also went into the respondent's lunchroom and was talking about the complainant with other employees when he was asked to leave by Meyer Garber, an employee in the shoe department who had been the buyer for that department before Mr. Pironcelli. Mr. MacNeil testified that Mr. Garber and Mr. Pironcelli had a close working relationship, and often spent time working together during the day.

8. On Monday, July 15, 1985, on Mr. MacNeil's supper break, between 4 and 5 p.m., Mr. MacNeil was in the respondent's cafeteria, where he stood up and made a 10 minute speech to the employees present asking them to support the complainant. Mr. MacNeil said he made reference to the complainant's applications for the certification at restaurants related to the respondent.

9. Mr. Pironcelli testified that he was unaware of Mr. MacNeil's speech on Monday, July 15th until he received a copy of this complaint that was filed with the Board. He explained that he waited until Tuesday, July 16 to discharge Mr. MacNeil because he wanted to discuss the matter with the respondent's other buyers at a board meeting, which was scheduled for Tuesday, July 16. Mr. Pironcelli testified that each buyer has the authority to dismiss employees. He also testified that he did not discuss the organizing campaign or Mr. MacNeil's role in it with the other buyers. Mr. Pironcelli initially testified in cross-examination that the buyers had not taken a role in campaigning against the complainant, but when confronted with some literature on the respondent's letterhead, signed by three persons who were buyers, corrected his evidence by indicating that some buyers had taken an interest in the complainant's organizing campaign and that he had himself very recently written similar letters to employees in his department. Mr. Pironcelli testified that the buyers did not discuss the respondent's strategy in respect of the complainant's organizing at the buyers' board meetings.

10. Mr. MacNeil, in cross-examination, was asked if he was working elsewhere, and

responded that he was. He testified that he got his new job after he had been discharged by the respondent and said that he filled out an application form for that new job after he started working there. However, when Mr. MacNeil was shown an application form that he had signed and dated July 12, Mr. MacNeil explained that he had merely asked about the possibility of being employed, but did not accept employment in that new job until after being terminated by the respondent. We note that that application form, exhibit number 5, contained a series of questions relating to Mr. MacNeil's present employment. Two of those questions and answers were:

"3. Why leaving 'Rock bottom wagas [sic]'.

...

5. When leaving and available to start 'July 22, 1985'."

11. Since this complaint alleges that Mr. MacNeil was discharged contrary to the *Labour Relations Act*, section 89(5) of the Act requires the respondent to affirmatively establish, on the balance of probabilities, that its conduct did not violate the *Labour Relations Act*. In order to determine whether the respondent has discharged that burden, the Board must examine all of the circumstances relating to the discharge, not for the purpose of determining whether there was just cause, but only to decide whether the discharge was motivated, in whole or in part, by the employee's union activity, or his exercise of rights under the Act. The analysis the Board uses in making that determination was set out in *Alpha Laboratories Inc.*, [1981] OLRB Rep. July 823 at 824:

"In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

'... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.'

It is not the function of the Board in the present case to decide whether or not the respondent had just cause to discharge the grievors. Our jurisdiction is limited to determining whether the respondent discharged the grievors because they were supporters of the complainant trade union or were exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent's actions, as indicated by the Board in *Fielding Lumber Company* [1975] OLRB Rep. Sept. 665, at paragraph 19:

'The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* - a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.'

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determinations are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

'In cases such as these the Board is very often required to render a determination based

on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities'. (See *National Automatic Vending Co. Ltd.* 63 CLLC 16,278)...."

12. In assessing the circumstances in order to determine whether the conduct was unlawful, the Board must consider "... the existence of trade union activity and the employer's knowledge of it, [and] unusual or atypical conduct by the employer following upon his knowledge of trade union activity ..." and "... must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct ...." (See *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 299 at 301.)

13. It is clear to us that Mr. MacNeil's attendance and punctuality were of real and legitimate concern to the respondent. We are also satisfied that Mr. MacNeil had, in fact, sought and obtained other employment prior to the respondent's discharging him on July 16, and it is more likely than not that he intended to leave the respondent's employ on July 22, 1985, and that he knew that he had another job waiting for him when he spoke to the respondent's employees in the cafeteria on July 15. However, simply because the respondent may have established that it had adequate cause to terminate Mr. MacNeil's employment or that Mr. MacNeil had obtained another job does not end the inquiry before us. The Board must be persuaded that the employee's exercise of rights under the *Labour Relations Act* played no part in the respondent's decision to terminate Mr. MacNeil's employment. That determination in this case must rest on our assessment of Mr. Pironcelli's evidence.

14. Mr. Pironcelli testified that he made up his mind to discharge Mr. MacNeil on Saturday, July 13, 1985. Yet, when Mr. MacNeil came to work on Monday, July 15, Mr. Pironcelli did not speak to him about his absence on the previous Saturday, or his pending discharge. This was explained by Mr. Pironcelli saying that he wanted to review the matter at the buyers' board meeting the next day. However, Mr. Pironcelli, who was aware of Mr. MacNeil's active role in the complainant, testified that Mr. MacNeil's union activity was not discussed. Mr. Pironcelli was quite specific in testifying that buyers had the authority to dismiss employees on their own, yet he wished to raise the dismissal of Mr. MacNeil with the other buyers. We were not provided with a plausible explanation for Mr. Pironcelli's desire to raise the matter of Mr. MacNeil's discharge with the other buyers. Mr. Pironcelli also denied knowing about the 10 minute speech that Mr. MacNeil gave in the company's cafeteria. However, it is unlikely that the other buyers with whom Mr. Pironcelli met the day after the speech was given had not heard about the speech. Furthermore, Mr. Pironcelli's evidence about the role of the buyers in responding to the complainant's organizing campaign was quite unsatisfactory. He initially denied any role for the buyers in setting out the respondent's views about the complainant, then finally admitted that the buyers, including himself, had recently sent letters to their employees about the complainant.

15. The respondent has not persuaded us that Mr. MacNeil's union activities on the previous Friday when he was actively campaigning and his speech to the employees on Monday were not a significant element in the discussion among the buyers that led to the discharge of Mr. MacNeil. Mr. Pironcelli, who on his own evidence, had decided to dismiss Mr. MacNeil on the Saturday waited until the following Tuesday to do so. The decision to



dismiss Mr. MacNeil, if it was Mr. Pironcelli's alone, could have been effected either Saturday or Monday. Waiting one more day to review the matter with his colleagues suggests to us that Mr. Pironcelli was somewhat unsure about dismissing Mr. MacNeil, but was persuaded to do so after the buyers' board meeting. Therefore, having regard to all of the evidence before us, we are not satisfied that the respondent did not act contrary to the Act when it discharged Mr. MacNeil on Tuesday, July 15, 1985.

16. Prior to his discharge, Mr. MacNeil actively sought, and, on the evidence before us, accepted other employment. We are satisfied that he formed the intention to resign from the respondent's employ for reasons entirely unrelated to any unfair labour practice committed by the respondent. Therefore, in these circumstances, it is not appropriate to direct the respondent to offer to reinstate Mr. MacNeil in his former job.

17. It is not clear whether Mr. MacNeil suffered any compensable loss as a result of the respondent's violation of the Act since he started working for his new employer shortly after he was discharged. However, if the parties are unable to agree on the issue of compensation, the Board will remain seized of that matter.

18. Having regard to the foregoing, the respondent is directed to:

- (a) pay Ron MacNeil compensation for his loss, if any, of wages and benefits resulting from the respondent's violation of the Act and to pay interest on such compensation, if any, calculated in the manner described in Practice Note No. 13, dated September, 1980;
- (b) to sign and post copies of the attached Notice marked "Appendix" as supplied by the Board in conspicuous places on its premises and to keep such notices posted for sixty (60) working days and to take all reasonable steps to ensure that the Notices are not altered or defaced or covered by any other material.

#### **DECISION OF BOARD MEMBER FRANK C. BURNET;**

1. The opinion of my colleagues sets forth standards enunciated by earlier panels for cases of alleged discharge for union activity. In summary, the reverse onus on the employer requires him to show, on balance of probabilities, first that the reasons given for the discharge were the only reasons, and second, that they were not tainted by anti-union animus. A further elaboration of the first is that the employer is however not required to prove that the discharge was for just cause.

2. These concepts do not stand in isolation but are inter-related and overlapping. Indeed, the first two standards are in reality only one, or at best, opposite sides of the same coin, for if the stated reasons are the *only* ones, then there cannot be another. In other words, what has been characterized as a "taint of anti-union animus" is clearly of such serious import to this Board's affairs as to constitute a reason or motive in itself. Practically speaking, therefore, this earlier standard can only mean that the employer must prove *either* that the professed reasons were the only ones *or* that there was no anti-union animus. The two are mutually exclusive.

3. Moreover, although the employer is not required to prove that his reasons constitute just cause, the Board must look to the weight of those reasons in reaching its decision. If they are trivial, then the possibility increases that they may merely mask an anti-union animus. Conversely, if they are weighty, that possibility decreases accordingly.

4. It is not unrealistic to require the employer to assume the burden of proving valid and positive reasons for the discharge, but it is impractical and unrealistic to require him to prove the negative proposition that there was no anti-union animus, beyond his own declaration to that effect. Certainly, he cannot be expected to declare that he welcomes or supports the applicant union, or a particular union in a competitive situation, for that too is forbidden by the Act. Strictly speaking neither can he prove that the reason or reasons given were as a group unique, as the list of such negative possibilities could conceivably be endless. The employer can only be expected to prove his own position and motivation, and then respond to specific and substantive allegations on their face — and not simply be required to respond to unspecified negative possibilities or vague allegations of a possible anti-union animus in what is obviously an adversarial situation.

5. Moreover, the fact that a disciplined employee was a member, supporter, or activist is clearly not evidence in itself of anti-union animus by the employer. To so conclude would be tantamount to accepting the principle of guilt by association. The consequences would then be that an activist role, or even union membership, properly advertised, would become a shield against any discipline, however well merited. The purpose of the Act is to prevent discriminatory discipline based on union activity or support, but not to provide protection from merited discipline *because* of such activity or support.

6. The overlapping and sometimes conflicting concepts in this earlier statement of standards should be clarified and simplified to properly express the intent of the Act. The Board must look to the weight of the reasons for the discharge not only to assure that they are not merely trivial excuses, but also to determine if in all the circumstances they would have provided a reasonable basis for the disciplinary decision *in the absence of any union organizing campaign or in a settled union-management relationship*. If so, the complaint should be dismissed and if not it should be sustained, with whatever corrective action is deemed appropriate.

7. I concur with the facts and evidence as set forth in the majority award, though I would amplify some and draw different inferences from others. The facts and evidence that I believe to be relevant to the issue before this Board are:

1. The employee, an obviously articulate young man, was a sales clerk in the shoe department of the respondents' store and had some eight months recognized service.

2. During that comparatively brief period of employment, on an unspecified but frequent number of occasions, the supervisor had interviewed, counselled or reprimanded the employee for unsatisfactory behaviour, including three written interview notices in January, March and May 1985, covering in all, nine misdemeanours from the beginning of the year. These pertained in the main to absenteeism, but also covered

such matters as reporting in an unfit condition to go to work (unshaven, disheveled, “reeking”), rough handling of stock during an emotional outburst, overstaying rest periods and stating openly that he would do so again as soon as the supervisor “cooled off”. It was common ground that many of his problems stemmed from alcoholism. The employee claimed progress in his attempts to control it but his supervisor reported only brief periods of improvement. The May notice was a final warning.

3. On Saturday, July 13, after prior consultation with a union official, the employee reported by telephone to the respondent that he was ill and received permission to be absent. Late that afternoon however he was observed by his supervisor in the vicinity of the store, though he had not reported in or entered the store. The supervisor testified that he then felt that “I was being taken for a ride”, and that he could no longer tolerate this behaviour, in fairness to his employer and the other employees. He decided to discharge the employee and did so on the following Tuesday, although he also had the opportunity to do so on the preceding day, Monday.

8. Given a very short service employee, a lengthy list of serious misdemeanours, flagrant and even planned disregard for ordinary timekeeping rules, numerous warnings and a culminating act of apparent deception, which seemed designed to provoke a confrontation, there was clearly ample evidence of just cause for termination—whether the employee was a union activist or not and whether it had occurred in an organizing phase or in a settled union-management relationship. (If not, then one might well ask what other offences should the employee be permitted before discharge would be appropriate?) I do not think the Board should order re-instatement or damages, nor can it do so without seriously undercutting the ordinary accepted standards or behaviour required of all employees.

9. It remains to comment on several other aspects touched on in the majority award. It is true that the employee made an allegedly impromptu speech in the cafeteria in favor of the union on Monday, following the Saturday culminating incident and preceding his discharge on Tuesday. There was no direct evidence that the supervisor was influenced by this. The only direct evidence in fact was the supervisor’s sworn statement that he was not even aware of the speech until after the discharge. I would not draw the same inference as my colleagues. On an earlier occasion, when the supervisor requested the employee to cease wearing a “Boycott Eatons” lapel button, as being inappropriate in a matter involving a competitive store, he specifically permitted continuation of wearing of the button of the applicant union, with advice to the employee that he was free to support or join any organization he wished. I think this evidence is counter-supportive to an inference of anti-union animus. I would emphasize that these considerations are in my view, not relevant in the first place because of the weight of the reasons for discharge in the light of standards discussed earlier—and even if they were relevant, they are not supportable.

10. Second, I find no anti-union motive in the fact that the supervisor delayed implementing his decision for a day in order to review the matter with his peer supervisors. Such delay and consultation for the purpose of assuring oneself of the correctness of a decision already reached, or even to assist in reaching it does not taint the decision. That process occurs at all levels in government, industry, unions and other organizations and is simply a



prudent step in the decision making process. Indeed, the Board itself is currently defending before the courts that very process among its own members.

11. In the instant case, the need for such prudence is underlined by the very hazards of maintaining disciplinary standards during a union organizing campaign, which this case graphically illustrates. It is not only prudent for supervisors to discuss such technical and complicated matters, but most knowledgeable employers require that they do so to assure consistency and compliance. The Board should not, logically or equitably, set up broadly phrased strictures against discipline in stated circumstances, and then penalize management or supervisors for discussing their application to those circumstances. It is necessary to distinguish between discussions by supervisors and management that are legitimate, perhaps even essential, and those specifically directed to frustration of the Acts' fundamental purposes. In my opinion, in the instant case, there was no evidence of the latter, either in direct examination of the supervisor or in cross-examination.

12. Accordingly, I find no basis, either in the one day delay in implementing the decision or in whatever discussion may or may not have taken place between supervisors on related union matters to alter the supervisor's decision. Similarly, the communications that management may have had with other employees on union affairs are not relevant to this specific act of discipline. If it is alleged that any of these discussions or communications are improper under the Act, then such charges should be made and tried on their merits, but such allegations or inferences drawn from them should not be the basis for reversing a normal business decision that would have been clearly warranted in a non-union situation or in a settled union-management relationship.

13. I would accordingly dismiss the complaint.

## Appendix

# The Labour Relations Act

# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THIS NOTICE IS BEING ISSUED IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD THAT WAS MADE AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT IN DISCHARGING RON MACNEIL FROM HIS EMPLOYMENT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP,  
THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT DISCHARGE OR THREATEN TO DISCHARGE ANY EMPLOYEE  
BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY.

WE WILL PAY RON MACNEIL COMPENSATION WITH INTEREST FOR HIS  
LOSS, IF ANY, OF WAGES AND BENEFITS THAT RESULTED FROM HIS  
DISCHARGE CONTRARY TO THE LABOUR RELATIONS ACT.

HONEST Ed's LIMITED

PER: \_\_\_\_\_  
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

**0580-85-R United Steelworkers of America, Applicant, v. Laurent Lamoureux Co. Ltd., Respondent**

**Practice and Procedure - Representation Vote - Party challenging voter eligibility required to explain or justify challenge in written submissions - Party not entitled to unilaterally withdraw from agreement on voter eligibility - Date of parties' agreement to vote and not date of Board direction of vote, relevant date to determine voter eligibility**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *R. J. Gallivan* and *K. V. Rogers*.

**DECISION OF THE BOARD;** November 20, 1985

1. This is an application for certification. On the basis of the parties' agreement, in a decision dated July 5, 1985, the Board found that there were three units of employees of the respondent appropriate for collective bargaining, namely:

Unit #1 - Office Employees

All office employees of the respondent at Hawkesbury, save and except Store Manager and persons above the rank of Store Manager.

Unit #2 - Full-Time Employees Excluding Office

All employees of the respondent at Hawkesbury, save and except Store Manager and persons above the rank of Store Manager, office staff and persons regularly employed for not more than twenty-four (24) hours per week.

Unit #3 - Part-Time Employees Excluding Office

All employees of the respondent at Hawkesbury, working not more than twenty-four (24) hours per week save and except Store Manager and persons above the rank of Store Manager and office staff.

In that decision, the Board certified the applicant with respect to unit #3, directed the conduct of a representation vote in unit #2 and appointed a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of two persons whose inclusion in or exclusion from unit #1 was in dispute. The vote in unit #2 was conducted on July 17, 1985. That same day, the parties signed a written agreement resolving their dispute about the identity of the persons who fell within unit #1 on the application date. In a decision dated July 25, 1985, this panel directed that a representation vote be conducted among persons employed by the respondent on July 17, 1985 in unit #1.

2. The representation vote in unit #1 was taken September 3, 1985. One or other of the parties challenged the eligibility to vote of five of the six persons who attended and cast ballots. All six ballots cast were segregated and have not been counted. The identity of each challenged voter and of the party challenging him or her was set out in the report of the



Returning Officer, notice of which was given to the affected employees, the employer and the trade union in Form 70. That notice, and the Board's Rules of Procedure, required persons wishing to make representations concerning the vote to give notice of that desire to the Board by October 15, 1985. Counsel for the applicant has filed submissions by letter dated October 15, 1985. By letter dated October 7, 1985, counsel for the respondent advised that his earlier letter of September 17, 1985 contained the respondent's submissions. Neither party has included in its submissions a request that the Board conduct a hearing in connection with the matters dealt with in the Returning Officer's Report. No employee has filed a statement of desire to make representations with respect to the Returning Officer's Report.

3. From the submissions of counsel, it appears the parties are now in agreement that three of the six persons who cast ballots on September 3, 1985, were entitled to vote, namely: Veronique Beauchamp, Josee Laflamme, and Gilles Seguin. Voters whose eligibility remains in dispute are: Jean Lamoureux, Lisette Larocque and Chentelle MacAllister.

#### Chantelle MacAllister

4. Chantelle MacAllister was not on the voters' list prepared prior to the vote on the basis of the parties' representations. When she attended to vote on September 3rd, her eligibility was challenged by the applicant but not by the respondent. In his letter of September 17th, counsel for the respondent said this about Ms. MacAllister:

Although the respondent had not proposed to add this person to the voters' list it is understood that she requested the right to vote on the basis that she does several hours of office work each week.

Although they deal in detail with the applicant's challenge to J. Lamoureux and the respondent's challenge to L. Larocque, the applicant's submissions contain no reference to Ms. MacAllister. They offer no reason for the challenge to her eligibility to vote. They do not address the circumstances of her employment. They do not respond to the statement made by counsel for the respondent in his letter of September 17th. They merely assert that if the applicant's request for reconsideration of the voter eligibility date is rejected

In the alternative the applicant submits the only eligible voters for the purpose of the vote held on September 3, 1985 are those persons set out in the respondent's letter of August 13, 1985 being Veronique Beauchamp, Josee Laflamme, Jean Lamoureux, Gilles Seguin and Lisette Larocque.

In short, the applicant has made no attempt to explain or justify its challenge.

5. If a party challenges a voter's eligibility, that party must set out the basis for the challenge in the written submissions it files with the Board in response to the Returning Officer's Report. If it fails to do so, the Board will treat the challenge as having been abandoned by that party. A ballot segregated by reason only of a subsequently abandoned challenge will be counted, unless from the material before the Board when the period for filing representations expires there appears some obvious reason why the challenged individual was ineligible to vote. There is no such reason here. Ms. MacAllister's ballot will be counted.

### Lisette Larocque

6. When this application first came on for hearing, the respondent took the position that Ms. Larocque was employed in a confidential capacity with respect to labour relations and so would not be an employee in the bargaining unit by operation of subparagraph 1(3)(b) of the *Labour Relations Act*. The Board appointed an officer to inquire into that and other matters. On July 17th the respondent agreed with the applicant that Lisette Larocque *was* an employee in the bargaining unit who would have been eligible to vote in a representation vote in that unit if one had been conducted that day. However, the respondent challenged her eligibility in its written submissions of August 13th on the voters' list and when Ms. Larocque attended to vote on September 3rd and in its submissions of September 17th. The respondent has not suggested that there has been any change in Ms. Larocque's duties and responsibilities since July 17th. The only ground the respondent offers for excluding Lisette Larocque is that at some point between July 17 and August 13, 1985, Ms. Larocque told the respondent that *she* felt she was employed in a confidential capacity with respect to labour relations matters and requested that she be excluded from the bargaining unit on that ground.

7. This Board has consistently held that parties will not be permitted to unilaterally withdraw from agreements made in earlier stages of certification proceedings: see, for example, *Diasons Press Limited*, [1964] OLRB Rep. Aug. 215; *Bertie District High School Board*, [1964] OLRB Rep. Aug. 231; *Warner Brothers Distributing (Canada) Limited*, [1974] OLRB Rep. Dec. 883; *J. J's Restaurants Limited*, [1977] OLRB Rep. July 465. It would be inconsistent with the approach exemplified by the decisions in those cases to now permit the respondent to challenge Ms. Larocque's status as an employee in the bargaining unit in the relevant time period. It is not necessary for us to determine whether Ms. Larocque could have challenged her own eligibility to vote despite the earlier agreement between the applicant and the respondent. Ms. Larocque has not sought to make any such representation to the Board at any time before or after the date of the vote in which, we note, she sought to participate despite whatever she may earlier have said to the respondent. We are satisfied that her ballot should be counted.

### Jean Lamoureux

8. Jean Lamoureux was not in the subject bargaining unit on the application date; he was then in unit #2. In his August 13th submissions on the voters' list for the vote now under consideration, counsel for the respondent wrote that Mr. Lamoureux was "working in the office as of July 17 and continuously since that date". The applicant challenged Mr. Lamoureux's eligibility both before and at the vote.

9. In its submissions on this challenge, the applicant asks that we reconsider our earlier decision that July 17, 1985 would be the date as of which voter eligibility would be determined. It argues that we should substitute June 28, 1985, which was the date on which this application was originally scheduled to be heard. Its submissions in support of this request are these:

Establishing the potential voters list as of June 28, 1985 avoids the possibility of any stacking of voting lists by the respondent. It also avoids the possibility that persons who were or had been determined to be employees in bargaining unit no. 2 or bargaining unit no. 3 as of June 28, 1985 could subsequently be considered a member of bargaining unit no. 1 for the purpose of the September 3 vote, and thus allow them to become part of the certification process of a second bargaining unit.

The applicant does not expressly accuse the respondent of moving Mr. Lamoureux into the office unit in order to influence the result of the vote.

10. The Board's approach to determining eligibility to vote in a representation vote was reviewed at length in *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. Apr. 461, in which the Board made these observations:

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit *both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken*, is clear as well known through the Board's published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Borden Co. Ltd.*, (1946), 46 CLLC 16,461) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter's lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

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20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover ....

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification. Any deliberate attempt to manipulate the eligibility rules and temporarily "pack" the voting constituency to influence the outcome of the vote can be dealt with through the Board's remedial authority in unfair labour practices (see, e.g. *Custom Aggregates*, [1978] OLRB Rep. Mar. 215). Any distortion in the selection process caused by a planned and *bona fide* substantial increase in the size of the bargaining unit in the near future can be accommodated by the application of the Board's build-up principles (*Emil Frant* 57 CLLC 18,057; *McCord Corporation*, [1965] OLRB Rep. June 203; *Domco Foodservices Limited*, [1980] OLRB Rep. Jan. 33....

(emphasis added)

We would add one refinement to those observations.

11. As of April 1980, except in the construction industry every order directing a vote was made at or following a hearing in which the parties attended before the panel which made the order. Often the order was pronounced orally at the hearing, and in those cases the parties normally met together right after the hearing to make vote arrangements and strike a voters' list. While the Board's written decision might issue several days later, it would be dated the day the order was pronounced, so that "the date the vote is ordered" in this context was usually the day it became clear there would be a vote and often the day the parties established the voters' list.

12. Since the introduction in May 1980 of the waiver program described in Practice



Note 12, an ever increasing percentage of orders directing votes come about as a result of operation of that program, or meetings of the parties with a labour relations officer on the initial hearing date or, as in this case, the settlement of issues after the scheduled hearing date in the course of an inquiry by a labour relations officer. The parties do not require a hearing, and none is held. Having seen that the direction of a vote is the necessary consequence of the facts on which they have agreed, the parties will often make vote arrangements at the conclusion of their settlement meeting. A few days later, a panel of the Board will review the officer's report on his or her meeting, and it will make the order the participants predicted if the agreements and filings are in order. The date of that order will be the date that panel makes that decision, which will necessarily be later than the date the parties settle the issues from which the vote results. If that later date were used as the voter eligibility date, the parties could never settle a voters' list at the meeting at which they resolved the issues which led to the vote. Accordingly, when a vote direction is based on a resolution of issues by the parties without the necessity of a formal hearing, the Board uses the date of the parties' agreement as the voter eligibility date, rather than the date of the subsequent order.

13. We see no reason to vary our original determination that voter eligibility would be determined as of July 17, 1985, which was the date of the document which records the parties' agreement on the identity of employees in the unit as of the application date. That was the one issue which had to be resolved before we could determine that a representation vote should be directed. The applicant's argument about possible stacking of voters' lists is answered in the passage quoted from *London District Crippled Children's Treatment Centre, supra*. As for the other submission, it is not unusual for the wishes of persons in two or more units of employees of the same employer to be tested at different times. We are not troubled by the resulting possibility that an employee's wishes may be relevant at one time while he or she is employed in an affected bargaining unit, and again at another time with respect to another bargaining unit to which he or she has, in the meantime, been transferred. The applicant's request that we reconsider the voter eligibility date is denied. That, however, does not put to rest the question of Mr. Lamoureux's eligibility to vote.

14. Although applicant's counsel did not challenge the assertion that Jean Lamoureux was employed in the subject unit, unit #1, on July 17, 1985, his reference to multiple bargaining units prompted a review of this file which led, in turn, to the following letter from the Registrar to counsel for the respondent:

In your letter of September 17, 1985, and an earlier letter of August 13th, you represented to the Board that an employee named Jean Lamoureux fell within bargaining *unit #1* (as defined in the Board's decision of July 5, 1985) as of July 17, 1985, so as to be eligible to cast a ballot in the representation vote in that unit directed in the Board's decision of July 25th and conducted September 3rd.

A representation vote was conducted in another unit, *unit #2*, on July 17, 1985. Only those employed in that unit on June 28th who remained employed therein on July 17th were eligible to vote. Our records indicate that Jean Lamoureux was named on the voters list prepared for that vote, that she voted and that she was not challenged. Moreover, our records include a Consent and Waiver dated July 17, 1985, apparently signed by you on behalf of the respondent, by which the parties expressly agreed that Jean Lamoureux was eligible for inclusion in *unit #2* on July 17, 1985. A copy of that document is enclosed.

I have been directed to request your explanation of the apparent inconsistency, inquire whether you still take the position that Jean Lamoureux was employed in bargaining *unit #1* on July 17th and ask you to ensure that your reply reaches the Board by the close of business on Tuesday, November 12, 1985.

Counsel replied as follows:

I am advised by the Respondent that Mr. Jean Lamoureux was working more than 24 hours per week in bargaining unit #2 as of July 17 and was also regularly employed within bargaining unit #1 as of that same date while filling in for office persons on vacation and performing other office work. Under that circumstance it is our submission that he is properly included in both of those bargaining units.

Before dealing with the effect to be given to this novel position, we wish to make two observations. The first is that in a labour relations context, a categorical representation that an employee is in one of several units on a given day is quite different from an assertion that an employee should be treated as being in both of two units on the same day. In the circumstances described in the Registrar's letter to counsel, we would have expected counsel to disclose the respondent's full position at an earlier date. The second observation is that the circumstances described are inconsistent with unit #1 being an appropriate unit severable from units 2 and 3. Had those circumstances obtained as of the application date and been brought to the attention of the Board before it determined the scope of appropriate bargaining units, it is unlikely the parties' agreement on that issue would have been accepted without further inquiry.

15. At this point, the position the respondent now takes must be assessed against the background of the findings and agreements which have already been made on the appropriateness of bargaining units and the identity of persons in those units at relevant times. The three bargaining units are mutually exclusive. The description of unit #2 expressly excludes the "office staff" in unit #1; likewise, those in unit #2 are, by necessary implication, excluded from unit #1. An employee cannot be in both units at the same time. For the purpose of determining eligibility to vote in a representation vote, "at the same time" means "on the same date", since eligibility is established by showing that the employee is employed in the subject unit both "on the date" established in the order directing the vote and "on the date" the vote is taken.

16. On July 17, 1985, the parties agreed that Jean Lamoureux was eligible to vote that day as an employee in unit #2. By necessary implication, they had agreed that he was employed in unit #2 on July 17, 1985. He could not be in unit #2 on July 17th if he was "office staff" on July 17th. The parties must be taken as having agreed on July 17th that Jean Lamoureux was not "office staff", and hence not in unit #1, on July 17th. The respondent will not now be permitted to adopt a position inconsistent with its earlier agreement. An employee not employed in unit #1 on July 17, 1985, was not eligible to vote on September 3, 1985. The ballot of Jean Lamoureux will not be counted.

17. Accordingly, we direct that all ballots cast except that of Jean Lamoureux be counted, and that arrangement to do so be made expeditiously in view of the delays which have occurred to date in this matter.

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**2577-83-M The Little Falls Dining Room, John The Sportsman Restaurant, Rockton Hotel, Valenca Restaurant, Atikokan Hotel, Steep Rock Inn, Employers, v. Hotel Employees Restaurant Employees Union, Local 75, Trade Union**

**Abandonment - Employer Organization - Practice and Procedure - Reference - Sale of a Business - Whether employer group constituting Employer Organization within meaning of Act - Whether non-member employers can be bound by collective agreement entered into by employer organization - Whether sale provisions can be relied on in proceedings on Minister's reference - Whether union abandoned bargaining rights**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *J. Wilson* and *B. L. Armstrong*.

**APPEARANCES:** *F. J. W. Bickford* for The Little Falls Dining Room, Steep Rock Inn and Valenca Restaurant; *Alick Ryder, Q.C.* for Hotel Employees Restaurant Employees Union, Local 75; no one appearing on behalf of John The Sportsman Restaurant, Rockton Hotel or Atikokan Hotel.

**DECISION OF THE BOARD; November 7, 1985**

1. This is a reference from the Minister of Labour to the Board pursuant to the provisions of section 107 of the *Labour Relations Act*. The Hotel Employees Restaurant Employees Union, Local 75, ("Local 75") has requested that the Minister appoint arbitrators to determine the merits of certain grievances which the union had filed against six employers in Atikokan. The grievances were filed under a purported collective agreement entered into on April 22, 1983. Several of the employers have objected to the appointment, contending that at the relevant time Local 75 did not represent their employees, or, in the alternative, that they were not bound to the April 22, 1983 collective agreement. In his reference, the Minister posed the following questions to the Board, namely:

... whether or not collective bargaining relationships exist between the employers and the trade union and, if so, whether or not the agreement of April 22, 1983 is binding upon them.

2. Partway through these proceedings, Local 75 withdrew its claim to hold bargaining rights with respect to The Little Falls Dining Room. Accordingly, there is no need to review the evidence relating to this facility.

3. We would note at this point that John The Sportsman Restaurant, the Rockton Hotel and the Atikokan Hotel, although served with notice of the hearing into these proceedings, did not attend at the hearing. Nevertheless, counsel for the other three employers made certain general submissions which, if accepted, would also relate to the three unrepresented employers.

4. The events giving rise to these proceedings began in October 1976 with the entering into of a memorandum of agreement between Hotel, Motel & Restaurant Employees & Bartenders International Union, Local 893 ("Local 893") and the "Atikokan Hotel Association". The memorandum of agreement took the form of a lengthy collective agreement. Local 893 was a local union of what is now (as a result of a change in name) Hotel Employees Restaurant Employees International Union. Local 893 was based in Atikokan, a community



of approximately 5,000 people some 150 miles west of Thunder Bay. Local 893 appears to have been a small local which, at times, lacked vigorous or knowledgeable leadership. Local 75, the trade union party to these proceedings, contends that it is the successor trade union to Local 893.

5. As already noted, the employer party to the 1976 agreement was the "Atikokan Hotel Association". Article 3(a) of the agreement referred to the Atikokan Hotel Association in the following terms:

The Union recognized the Association as an Employers' Organization acting as bargaining agent for the Employers listed in Schedule "A" attached hereto (each of whom is hereinafter referred to as the "Employer") in negotiations of a collective agreement with the Union.

Schedule "A" to the agreement reads as follows:

Schedule A

Rockton Hotel

Atikokan Hotel

The signing page of the agreement has, under the heading "for Atikokan Hotel Association", the signatures of two individuals. One was identified as the signature of Mr. John Torbiak, the owner of the Atikokan Hotel. The other signature is illegible. No evidence was led as to the founding or possible constitution of the Atikokan Hotel Association. As already noted, neither the Atikokan Hotel nor the Rockton Hotel was represented at the hearing into these proceedings.

6. On June 26, 1979 a new agreement was entered into, stated to run from July 1, 1979 to June 30, 1982. The heading of this agreement read as follows:

Memorandum of Agreement

between Hotel, Motel, Restaurant Employees Union Local 893, Atikokan, Ontario  
and the Atikokan Hotel & Restaurant Association said to include,

Atikokan Hotel  
Hotel Steep Rock  
Rockton Hotel  
John The Sportsmans Restaurant Ltd.  
Valenca Restaurant  
Little Falls Dining Club.

The parties hereto agree to the following items as a basis of all items outstanding:

1. A common contract to be based on the terms and wage rates of the expired agreement between Hotel, Motel & Restaurant Employees & Bartenders Intl. Union, Local 893 and the Atikokan Hotel Association. Amended as follows.

There then followed a number of clauses containing changes to certain of the provisions in the 1976 agreement as well as a number of new provisions. One of the new provisions read as follows:

8. The Union agrees that the rates presently being paid at the Valenca Restaurant for the incumbent cook and Second Cook shall be Red Circle Rates and will become redundant when the incumbents terminate their employment. The rates for these positions shall be:

	<u>Present</u>	<u>July 1/79</u>	<u>July 1/80</u>	<u>July 1/81</u>
Cook	5.25	5.55	6.13	6.71
Short Order Cook	5.00	5.48	6.06	6.62

The signing page to the document contained the following heading and signatures:

For the employer

Atikokan Hotel "John Torbiak"

Hotel Steep Rock "Terri Hart"

Rockton Hotel "A. E. Olson"

John The Sportsman  
Restaurant and Little  
Falls Dining Club "J. Babiak"

Valenca Restaurant "M. B. Gomes"  
" (illegible) Gomes "

At the time, Mr. John Babiak was both the owner of John The Sportsman Restaurant and the operator of The Little Falls Dining Club.

7. The only employer signatory to the 1979-1982 agreement who testified in these proceedings was Mr. M. Gomes, the owner of the Valenca Restaurant. Mr. Gomes testified that he is an immigrant from Portugal who, between 1959 and 1977, worked with the Canadian National Railway fixing track. In 1977 he purchased the Valenca. According to Mr. Gomes, when he purchased the restaurant, he could read "almost nothing" in English, and even now he reads "very little" English. In these proceedings, Mr. Gomes testified in fairly fluent, although heavily accented, English. According to Mr. Gomes, in June of 1979 a group of people came to his restaurant, of whom he recognized only Mr. John Babiak, the owner of John The Sportsman Restaurant. Mr. Gomes testified that Mr. Babiak had at times given him advice about the operation of his restaurant. According to Mr. Gomes, after he joined the group, there was some discussion about a union, which he did not understand. Later, everyone signed a document. According to Mr. Gomes, Mr. Babiak told him to sign, and accordingly, he did so, as did his wife. Mr. Gomes testified that when he signed the agreement, he felt he was signing with respect to some town-related business, and did not know that he was signing a collective agreement.

8. Before leaving the matter of the 1979-1982 agreement, we would comment on the state of the document itself. When filed in these proceedings, the document had lines drawn through its various provisions (but not the signatures) in a different colour of ink to that used to draft the document. The only person to testify with respect to the lines was Mrs. Margaret Slobozian, who at the time was an active member of Local 893 and who later became its

president. Mrs. Slobozian testified that she recalled that the lines were put through the document when she and others were using it to prepare yet another document. Based on this recollection Mrs. Slobozian indicated that she felt that there must have been a more detailed document prepared incorporating the terms of the June 26, 1979 agreement. However, continued Mrs. Slobozian, she did not actually recall signing any such document. At another point in her testimony, Mrs. Slobozian suggested that the lines may have been put through the June 26, 1979 document when that document was used as an aid in preparing proposals for a later collective agreement. Given Mrs. Slobozian's testimony, and the lack of any contradictory evidence on point, we are satisfied that whenever the lines were placed through the June 26, 1979 document, it was subsequent to the document's execution and do not affect its validity.

9. As indicated above, someone executed the June 26, 1979 document on behalf of each of the six employers named in the agreement. As already noted, of the individuals who signed for the employers, only Mr. Gomes testified. From Mr. Gomes' testimony, it appears that the Valenca Restaurant never formally took out membership in, or assigned bargaining rights to, the Atikokan Hotel and Restaurant Association. It is of some interest that Mrs. Slobozian, the only signatory to the June 26, 1979 document on the union side who testified in these proceedings, stated that it was her understanding that each of the people who signed on the employer side signed for themselves individually. Mrs. Slobozian further testified that in the discussions leading up to the signing of the document, each of the owners had spoken for themselves, although Mr. John Babiak of John The Sportsman Restaurant had done most of the talking.

10. It appears from Mrs. Slobozian's testimony that initially all of the employers signatory to the June 26, 1979 document applied its provisions, including deducting dues from employee wages and forwarding them to the union. Notwithstanding the testimony of Mr. Gomes to the effect that he was not aware that he had signed a collective agreement, the Valenca initially paid its employees pursuant to the agreement and deducted and forwarded dues to the Local with respect to some of its employees. Mr. Gomes explained this by saying that he paid his employees the same as was being paid to employees at John The Sportsman Restaurant, and that it was his bookkeeper who had deducted the union dues. In cross-examination, Mr. Gomes acknowledged that he and his wife had signed all employee paycheques as well as all cheques to the union covering dues deductions.

11. It is not at all clear from the evidence as to just how long the Valenca continued to apply the terms of the collective agreement. Mr. Gomes in his testimony indicated that the restaurant stopped applying the agreement in 1980, while Mrs. Slobozian variously indicated that the date in question was in early 1982, sometime in 1979, and about a year after the signing of the June 26, 1979 document. However, Mrs. Slobozian most frequently referred to 1979 as the year in which the Valenca ceased applying the agreement. Given this evidence, we are led to conclude that the Valenca applied the terms of the June 26, 1979 agreement until sometime in 1979 or 1980. According to Mr. Gomes, he stopped applying the agreement after his employees had signed a letter to the union, which had been typed by his bookkeeper, indicating they did not want to be involved with the union or pay union dues. Mrs. Slobozian's recollection was that at the time Mr. Gomes had said to her that he did not need the union since he and his wife were doing the work at the restaurant. It was also Mrs. Slobozian's recollection that at the relevant time the restaurant had only one employee, and this employee had written to the union saying that she did not want the union or to have union dues deducted



from her salary. Mrs. Slobozian acknowledged that from that time forward, the Valenca did not regard itself as bound by a collective agreement.

12. Commencing in 1978, the economy of Atikokan started to suffer as two local mines began to wind down their operations. This downturn in the economy affected the local hospitality industry. One of the results was the closing of the Hotel Steep Rock in August of 1979. The hotel building, its furnishings and certain stock-in-trade were taken over by the Federal Business Development Bank, presumably pursuant to a mortgage arrangement. On or about December 21, 1979 the Federal Business Development Bank sold the hotel building, furnishings, and stock-in-trade to Steep Rock Inn (1979) Ltd., a firm owned by Mr. James Balonyk and Mr. M. Hensrud. The purchase did not specifically include any goodwill. The new owners of the hotel replaced all existing furniture and carpets. They also did some repair work and turned an area that had been used for a bar into a banquet room and meeting rooms. The hotel reopened in February 1980, under the name of Steep Rock Inn instead of the former Hotel Steep Rock. The Inn hired all new employees. These new employees came within classifications provided for in the 1979-1982 collective agreement.

13. The new owners of the Steep Rock Inn took the position that they had no relationship with Local 893. On February 4, 1980, Ms. Connie Daw and Mrs. A. MacDavid, the secretary and president respectively of Local 893, jointly wrote to Mr. Hensrud, one of the new owners of the Steep Rock, as follows:

As part of the new ownership at the Hotel Steep Rock, we wish to bring to your attention that a subsisting collective bargaining agreement is in effect between your predecessor and Local 893.

Under the provisions of the Labour Relations Act, Local 893 holds successor [sic] rights with your new company and fully intends to enforce all provisions of the collective agreement now in force and effect.

We request your written acknowledgement of this letter, together with your written agreement to continue recognition of Local 893 as required at law.

Trusting we will hear from you forthwith in this matter.

This letter was not responded to. On March 27, 1980 Ms. MacDonald and Ms. Daw sent a letter to the Steep Rock which read as follows:

To Whom It May Concern:

Attention: Mr. Hensrud, Mr. Balonyk

Due to the fact that you have Dining room girls working and you have been open approximately 30 days, we have not recieved [sic] your union list of girls or union dues for them.

We would like to point out to you once again, Article 29, page 12, Successor Rights in your contract, which we have at your establishment. It is imparative [sic] that we have your answer as to whether you are accepting the union or not within 48 hours or we intend to take legal steps and refer you to the Board.

The second letter was also not replied to. On April 11, 1980 four grievances were filed with the Steep Rock Inn. One was a grievance by Local 893 complaining that the Inn's owners had "not accepted the union and have not called back the union girls". The other three grievances

were by individuals who had been laid off at the time the Steep Rock had closed. In their grievances the three complained that they had not been recalled to work when the Inn re-opened. The individuals personally delivered the grievances to the Inn, at which time they were told by Mr. Hensrud that the new owners did not have a collective agreement with the union. The Inn did not respond to any of the grievances. Local 893 did not pursue the grievances to arbitration. It was the evidence of Mr. Balonyk, one of the new owners of the Steep Rock Inn, that at the end of April 1980 Mr. Thomas Rees, an official of the International Union, came to the front desk of the hotel and talked to him. Mr. Balonyk testified that he advised Mr. Rees that he would not talk to him since the Inn had nothing to do with the union, at which point Mr. Rees left. Mr. Rees, however, denied that he had visited the Steep Rock in April of 1980.

14. Mr. Rees testified that he is an international union organizer based in Montreal. Another International Union representative, Mr. Charlie Ireton, had assisted Local 893 in the events leading up to the signing of the 1979-1982 agreement. However, Mr. Ireton had since retired, leaving Mr. Rees as the only International Union organizer in Canada. According to Mr. Rees, in late 1981 the International Union office in Cincinnati sent him a copy of a letter to the International from Mrs. Slobozian, the then President of Local 893, seeking assistance. Given his other duties, Mr. Rees' assistance to the Local was limited primarily to a series of short trips into Atikokan. Mr. Rees did ask Mr. Kowalczyk, the full-time business agent of a union local in Thunder Bay, to assist Local 893. Mr. Kowalczyk was not called to testify in these proceedings. The limited evidence of other witnesses touching upon Mr. Kowalczyk's activities indicates that Mr. Kowalczyk actually spent very little time on matters pertaining to the situation in Atikokan.

15. It is clear that by the time Mrs. Slobozian became president of Local 893 in 1981 only the Atikokan Hotel, the Rockton Hotel and John The Sportsman Restaurant were applying the terms of the collective agreement. There were a number of problems with John The Sportsman remitting dues deducted from employee wages, but the amounts involved were always remitted after Mr. Rees discussed the matter with the owner. Mr. Rees also made a visit to the Valenca Restaurant. Mr. Rees testified that he believed he went to the Valenca in March of 1982, although in cross-examination he agreed his visit might have been in 1981. When Mr. Rees visited the Valenca, he raised with Mr. Gomes, the owner, the fact that he had not been remitting union dues or paying the employees the proper wages, to which Mr. Gomes replied that he did not want to have anything to do with the union. How the conversation ended is in dispute. Mr. Gomes testified that after he told Mr. Rees he did not want to have anything to do with the union, Mr. Rees threw a book he was carrying on the floor and yelled until ordered out of the restaurant. Mr. Rees, however, testified that he was starting to discuss the terms of the collective agreement when Mrs. Gomes pulled out a big carving knife, at which point he concluded it was time to leave. Mr. Rees testified that he advised the Local to send a registered letter to the Valenca setting out its position, and that he was later advised that such a registered letter had been sent, but not picked up.

16. As noted above, it was the evidence of Mr. Balonyk, one of the owners of the Steep Rock Inn, that in April 1980 Mr. Rees visited the Inn only to be told by Mr. Balonyk that the Inn had nothing to do with the union. Mr. Rees denied that this had occurred. According to Mr. Rees he made one visit to the Steep Rock. At various points in his testimony Mr. Rees indicated that his visit was in late 1980, in 1981, and in early March 1982. Mr. Rees testified that on his visit to the Steep Rock he presented himself at the front desk, handed the person

at the front desk his card, and asked to see the manager. Mr. Rees was advised that the manager was busy. Mr. Rees waited for an hour, only to then be advised that the manager had left the Inn.

17. The 1979-1982 agreement expired on June 30, 1982. On September 7, 1982 Mr. Rees, on behalf of Local 893, filed a request for the appointment of a conciliation officer to assist with the negotiations of a new agreement. On the request form, Mr. Rees referred to the employer as "Atikokan Hotel Association, representing among others, Atikokan Hotel, Rockton Hotel, John The Sportsman Restaurant, Valenca Restaurant", and listing the address of the employer as "Mr. John Torbiak, President, Atikokan Hotel Association, Atikokan Hotel". Mr. Rees testified that he prepared the form in question at his home in Montreal following a telephone call from Mrs. Slobozian. Mr. Rees testified that the omission of the Steep Rock Hotel and The Little Falls Dining Room occurred only because he did not have all the names of the Atikokan hotels and restaurants before him when he filled in the form, and was not because the union was of the view that it did not have bargaining rights for these two establishments. The application for appointment of a conciliation officer contained the following comment:

The individual employers have never given notice to the Trade Union that they are no longer members of the Association.

Nonetheless, each individual employer was requested to negotiate by the Trade Union by individual notice in addition to the notice to bargain given the Employers Association.

No further detail was given with respect to any notices to bargain, including which employers were, or were not, given an individual notice to bargain. There was, however, filed with the Board a copy of certain bargaining proposals prepared by officials of Local 893. These proposals are under a covering page which state that a new agreement was to be between Local 893 and

"Atikokan's Hotel Association said to Include that which are Union:

Atikokan Hotel  
Rockton Hotel  
John The Sportsman's Restaurant Ltd.  
Valenca Restaurant"

18. On September 22, 1982 the Minister of Labour appointed a conciliation officer. The conciliation officer scheduled a meeting for October 5, 1982 in Atikokan. Mr. Rees and certain officials of Local 893 attended the meeting on behalf of the union. Attending on the employer side were Mr. J. Babiak, of John The Sportsman, Mr. J. Torbiak of the Atikokan Hotel, and Mr. J. Perchaluk of the Rockton Hotel. At the meeting a memorandum of settlement was entered into between Local 893 and the "Atikokan Hotel Association". By way of the memorandum the parties agreed to the terms of a collective agreement which they did "agree to recommend ... to their respective principals". The memorandum was signed by Mr. Torbiak, Mr. Babiak and Mr. Perchaluk "for the Association".

19. One of the provisions of the memorandum of settlement was that "effective 1st November, 1982 the Association agrees to recognize Local 75 as the bargaining agent succeeding Local 893". This provision recognized a proposed merger of Local 893 into Local 75 that was scheduled to become effective November 1, 1982. The effectiveness of this merger



is one of the issues in these proceedings. Local 75 is a large Toronto-based local which, in 1982, began to absorb a number of smaller locals of the Hotel Employees Restaurant Employees International Union in Ontario. The evidence before us establishes that a vote was held in which a majority of members of Local 893 voted in favour of the local merging with Local 75. Article 5, section 19 of the Constitution of the International Union empowers the union's General President, with the approval of the union's general executive board, to merge local unions. This power was exercised by an instrument dated October 25, 1982 entitled "Declaration and Order for Merger" signed by the President under which Local 893 was merged into Local 75 effective November 1, 1982. Having regard to these facts, we are satisfied that Local 75 has acquired the rights, privileges and duties of Local 893 with respect to the employers who are party to these proceedings.

20. On April 6, 1983, Local 75 filed grievances against the Atikokan Hotel, the Rockton Hotel and John The Sportsman Restaurant alleging that the three establishments had not made payments to the union's health and welfare plan as provided for in the memorandum of agreement signed on October 5, 1982. The grievances were signed by Mr. George Pineo, the Business Manager and Secretary of Local 75. When testifying before the Board, Mr. Pineo was asked why grievances had not been filed against either the Valenca Restaurant or the Steep Rock Inn. Mr. Pineo, who is based in Toronto, testified that he had received information from Tony Kowalczyk that employees at the Atikokan, Rockton and John The Sportsman had problems collecting on dental claims, and that he had investigated the matter and discovered that the three establishments were not making the required payments. Accordingly, stated Mr. Pineo, he filed the grievances against the three employers. It will be recalled that Mr. Kowalczyk had been the business representative of the Thunder Bay Local of the union. It appears that by this point in time the Thunder Bay Local had become (or was shortly about to become) part of Local 75, and that Mr. Kowalczyk was serving as a business representative on behalf of Local 75. On April 12, 1983 Local 75 requested that the Minister appoint an arbitrator to hear the three grievances pursuant to the expedited arbitration procedures set out under section 45 of the *Labour Relations Act*. As provided for in section 45, the Minister appointed a grievance settlement officer to meet with the parties. The grievance settlement officer met with representatives of the union and the three grieved against employers in Atikokan on or about April 22, 1983. (Some of the evidence suggests that the meeting may have actually been held on April 21st.) On that day the union and the three employers entered into a settlement whereby the employers agreed to make payments to the health and welfare plans.

21. While the grievances were being settled on April 22, 1983, a discussion occurred concerning the possibility of signing a formal collective agreement embodying the terms of the memorandum of agreement of October 5, 1982. Such a document had been brought to the meeting by the union representatives. Near the conclusion of the meeting the collective agreement, which had already been executed on behalf of the union, was signed by representatives of the three employers in attendance. The agreement filed with the Board has a covering page to it. Counsel representing certain of the employers in this matter contended that the covering page had been added after the document had been signed by the employers. However, the only person to testify who had been present at the meeting, namely, Mr. Terry Smith, who had been in attendance on behalf of Local 75, indicated that the cover page was on the agreement at the relevant time. In these circumstances we are satisfied that the cover page was on the document when executed by the employers. The cover page read as follows:

ATIKOKAN HOTEL

ASSOCIATION AGREEMENT

BETWEEN:

ATIKOKAN'S HOTEL ASSOCIATION

AND:

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES UNION, LOCAL 75

SUCCESSOR UNION TO LOCAL 893

EFFECTIVE:

1ST DAY OF JULY, 1982

TO

30TH DAY OF JUNE, 1984

ATIKOKAN'S HOTEL ASSOCIATION SAID TO INCLUDE:

- ATIKOKAN HOTEL
- HOTEL STEEP ROCK
- ROCKTON HOTEL
- JOHN THE SPORTSMAN'S RESTAURANT LTD.
- VALENCA RESTAURANT
- LITTLE FALLS DINING CLUB

22. The marks beside the names of the Atikokan Hotel, the Rockton Hotel and John the Sportsman's Restaurant on the cover page of the agreement appear to have been entered in ink. It will be recalled that representatives of these three establishments were at the meeting of April 22, 1983. On the first page of the collective agreement after the cover page is a heading indicating that the agreement is between Local 75 and "Atikokan Hotel Association". Article 3(a) of the agreement provides that the union recognizes the Association "... as an Employers' Organization acting as bargaining agent for the Employers listed in Schedule "A" attached hereto ...". There is no schedule "A" attached to the agreement. On the signing page, under the heading "For the Company" are the signatures of Mr. John Babiak, of John The Sportsman Restaurant; Mr. John Torbiak, from the Atikokan Hotel, and Mr. Joseph Perchaluk of the Rockton Hotel. Mr. Terry Smith, who, as already noted, was the only person present at the meeting on April 22nd who testified, stated that he understood that these three gentlemen had signed on behalf of the Atikokan Hotel Association.

23. The terms of settlement of the grievances of April 6, 1983 were not honoured by the three employers signatory to the settlement. Accordingly, on August 16, 1983 fresh grievances were filed against the three. At the same time grievances were also filed against The Little Falls Dining Room, the Valenca Restaurant and the Steep Rock Inn. Mr. Pineo testified that grievances were filed against these three additional establishments because he had discovered that they also had not been making payments to the health and welfare plan. It appears that at least the first attempt to serve copies of the grievances on the employers was made by Mr. Kowalczyk. Mr. Balonyk, one of the owners of the Steep Rock Hotel, testified that in August of 1983 Mr. Kowalczyk came to the hotel with a letter, but he refused to accept it. Mr. Allan Taylor, now a full-time representative of Local 75 based in Thunder Bay, testified that in August of 1983 he accompanied Mr. Kowalczyk to Atikokan while he delivered some letters to a number of establishments, including the Valenca restaurant. According to Mr. Taylor, at the Valenca, Mr. Gomes, the owner, indicated that he was not interested in the union and that there was no union at the restaurant. When Mr. Kowalczyk handed Mr. Gomes a letter, Mr. Gomes ripped it up, put it on the floor, and told Mr. Kowalczyk and Mr. Taylor to leave, which they did.

24. On August 30, 1983 Mr. Pineo requested that the Minister of Labour appoint arbitrators to deal with the August 16, 1983 grievances pursuant to section 45 of the Act. A grievance settlement officer was appointed to try to help the parties resolve the matter, but without success. Subsequently, Mr. Pineo requested that the grievances proceed to an arbitration hearing. It was at that point that certain of the employers objected to the appointment of an arbitrator, contending that Local 75 held no bargaining rights with respect to their employees or, in the alternative, they were not bound to the April 22, 1983 collective agreement. This in turn led to the Minister referring this matter to the Board.

25. We turn now to consider the status of the bargaining rights affecting the various employers. The position of counsel for certain of the employers is that there is not, and never has been, an organization known as the Atikokan Hotel Association. It follows, contends counsel, that any agreement entered into by the Atikokan Hotel Association is invalid since one cannot have an agreement with an imaginary party. There is no evidence before the Board, one way or the other, to show that the Atikokan Hotel Association was formed as a formal employers' organization with a constitution or letters patent, or that it has "members" in the sense of employers formally joining the organization. It may well be that at all times the Association was nothing more than an informal grouping of employers who were acting together. The two "founding members" of the Association, namely the Rockton Hotel and the Atikokan Hotel, could likely have been able to clear up the matter of the status of the Association, but neither attended at the hearing in this matter. If the Association was a formal employers' organization within the meaning of section 1(1)(j) of the Act, then it was entitled under section 51, the relevant parts of which are set out below, to enter into collective agreements on behalf of its member employers.

51.-(1) A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of



the employers' organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.

(2) When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.

If, however, the Association was not a formal employers' organization, but merely a loose grouping of employers acting together, then, in our view, when a representative of each employer signed a collective agreement, it bound that employer to the agreement as a separate party to the agreement. Non-signatories of the agreement, however, would not have been bound.

26. Given our conclusions set out above, it is relatively simple to deal with the situation of the Rockton and Atikokan Hotels. If the Atikokan Hotel Association was an employers' organization under section 1(1)(j) of the Act, then since the Rockton Hotel and Atikokan Hotel were apparently the founding members of the Association and never withdrew from membership, the Association at all times had authority to bargain on their behalf, and they would have been bound to all collective agreements entered into by the Association. If, however, the Atikokan Hotel Association was not an employers' organization within the meaning of the Act, but simply a loose grouping of employers acting in concert, the two hotels would still be bound to the April 22, 1983 collective agreement since representatives of both hotels executed the document. In these circumstances, we are satisfied that Local 75 holds bargaining rights with respect to employees of both hotels, and that both hotels were bound by the provisions of the collective agreement entered into on April 22, 1983.

27. The situation with respect to the Valenca Restaurant is somewhat different. Mr. Gomes' evidence indicates that the Valenca never formally became a member of the Atikokan Hotel Association and never specifically authorized the Association to bargain on its behalf. Mr. Gomes and his wife did, however, sign the document of June 26, 1979. On the objective evidence, we reject Mr. Gomes' testimony that he did not know what he was signing. Mr. Gomes acknowledged that he signed the document following a discussion about the union. The document contained a provision which related only to the Valenca. After signing the document, the Valenca for a time deducted dues from employee wages and forwarded them to the union. Although Mr. Gomes tried to indicate that this was something his bookkeeper had done on his own initiative, Mr. Gomes acknowledged that he and his wife were the ones who actually signed employee paycheques and the union dues cheques. Accordingly, they would have been aware that the restaurant had dealings with the union. In all the circumstances, we are satisfied that Mr. Gomes likely did understand that he was signing a document related to the union, and that he subsequently knowingly applied the terms of the agreement.

28. It will be recalled that the agreement entered into on June 26, 1979 did not in itself contain all the terms agreed to by the parties, but rather incorporated, with certain changes, the terms of a previous collective agreement. Counsel for the Valenca contends that the

document of June 26, 1979 could not be a collective agreement binding on the Valenca in that the Valenca had not been party to the previous agreement. In our view, this argument does not stand. At law there was nothing prohibiting the Valenca from agreeing to be bound by a new agreement which incorporated, by reference, the terms of a previous agreement to which it was not bound. In our view, this is what occurred when Mr. and Mrs. Gomes signed the June 26, 1979 agreement on behalf of the Valenca.

29. The collective agreement entered into by the Valenca on June 26, 1979 expired on June 30, 1982. The Valenca did not sign any subsequent collective agreement. The question arises as to whether either the memorandum of settlement entered into on October 5, 1982, or the formal collective agreement entered into on April 22, 1983 were binding on the restaurant. Counsel for Local 75 submits they were, contending that those who signed the April 22, 1983 agreement were agents for, or at least had ostensible authority to bind, the Valenca. Counsel further contends that since the Valenca held itself out to be a member of the Atikokan Hotel Association at the time it executed the 1979 agreement, it would be unfair for the Board to now hold that the Valenca was not bound by the subsequent agreements entered into by the Association. We are unable to accept this contention. Prior to the signing of the memorandum of agreement in October of 1982 and the signing of the collective agreement in April 1983, the union had been put on actual notice that the Valenca did not want to have any dealings with the union. Mrs. Slobozian of Local 893 was advised of this fact in 1979 or 1980. In or before March of 1982, Mr. Rees was advised by Mr. Gomes that he did not want to have anything to do with the union. Mr. Rees was at the time an official of the International Union acting on behalf of Local 893. Local 893 was clearly aware of the position being taken by the Valenca. When Local 75 became the successor to Local 893, it acquired the rights of Local 893 such as they existed at the time, including any consequences which flowed from Local 893's knowledge of the position adopted by the Valenca. Given the position adopted by the Valenca, we are satisfied that it would have been unreasonable for Local 75 to believe that those signing the October 1982 and April 1983 documents had real or ostensible authority to sign on behalf of the Valenca. Equally, we do not believe it can reasonably be said that the union was in any way misled concerning the status of the Valenca.

30. If the Valenca was bound by the provisions of the April 22, 1983 collective agreement, it would only be because of the legal effect of section 51. Section 51 relates to collective agreements entered into by employers' organizations. As already noted, it has not been demonstrated one way or the other that the Atikokan Hotel Association is an "employers' organization" within the meaning of the Act. Accordingly, Local 75 has not demonstrated that the section applies in this case. Further, even assuming that the Atikokan Hotel Association is a formal employers' organization under the Act, we do not believe the action of the Association in signing the 1983 collective agreement had the effect of binding the Valenca to the agreement. A fair reading of section 51 contemplates that an employers' organization will bargain for and bind its members (although not necessarily all of its members) to a collective agreement, but that it cannot bind non-members. See: *Paul D'Aoust Construction Limited*, [1976] OLRB Rep. Sept. 529. If it is the case that the Atikokan Hotel Association is a formal employers' organization, the Valenca never became a formal member of the organization and, hence, did not automatically become bound to agreements entered into by the Association. As already noted, regardless of the formal status of the Hotel Association, the Valenca was bound to any collective agreements actually executed by an official of the restaurant. In that no official of the restaurant executed either the October 1982 memorandum or the April 22, 1983 collective agreement, we are satisfied that the Valenca Restaurant was not bound by the terms of the collective agreement.

31. Counsel for the Valenca contends that the union abandoned its bargaining rights with respect to the restaurant. The Board has in certain cases concluded that, because of a union's inactivity, the union can be taken to have abandoned its bargaining rights. Such a conclusion does not involve the Board terminating a union's bargaining rights because of the union's inactivity, but rather the Board making a finding of fact that the union had voluntarily given up those rights. See: *John Entwistle Construction Ltd.*, [1979] OLRB Rep. Nov. 1096 and *Re Carpenters District Council of Lake Ontario and Hugh Murray (1974) Ltd. et al; Re Labourers' International Union of North America and John Entwistle Construction Ltd. et al*, (1982) 125 D.L.R. (3d) 568 (Ont. Div. Ct.). In the instant case, we do not believe that the union ever voluntarily gave up its bargaining rights with respect to the Valenca. On June 26, 1979 Local 893 entered into a collective agreement with the Valenca which was to run until June 30, 1982. In 1981 or early 1982 Mr. Rees, on behalf of Local 893, visited the Valenca to complain that the restaurant had not been remitting union dues or paying employees pursuant to the collective agreement. On September 7, 1982 Mr. Rees filed a request for the appointment of a conciliation officer which named the Valenca. The bargaining proposals prepared by Local 893 at about the same time specifically named the Valenca. The formal collective agreement signed by Local 75 on April 22, 1983 referred to the Valenca Restaurant on its cover page. On August 16, 1983 Local 75 grieved against the Valenca. While the evidence as a whole indicates that from 1980 or early 1981 to 1983, the union (and particularly Local 893) was ineffective in trying to enforce its bargaining rights, the actions taken on behalf of Local 893 and Local 75 referred to above, are not indicative of any actual abandonment of bargaining rights. Further, at no time was an application filed to have the Board formally terminate bargaining rights at the Valenca pursuant to the provisions of the *Labour Relations Act*. In all of the circumstances, we are satisfied that Local 75 retains bargaining rights with respect to employees of the Valenca Restaurant. As already noted, however, the Valenca did not sign or become bound by the terms of the 1983 collective agreement.

32. This then brings us to the final employer party to these proceedings, namely, the Steep Rock Inn. The Hotel Steep Rock signed the 1979-1982 collective agreement. It will be recalled that the hotel closed in August of 1979 and the hotel building, furnishings and certain stock-in-trade were taken over by the Federal Business Development Bank. The bank, in turn, sold these items to the Steep Rock Inn (1979) Ltd., which, after making structural changes to the building and replacing all existing furniture, re-opened in February 1980 under the name of Steep Rock Inn. In these proceedings, Local 75 contended that there had been a sale of a business to the Steep Rock Inn (1979) Ltd. such that its bargaining rights continued with respect to the new owners. It will be recalled that a similar claim was advanced by Local 893 in its February 4, 1980 and March 27, 1980 letters to the new owners of the Steep Rock Inn, although the claim was not adjudicated on at the time.

33. The sale of a business is dealt with by section 63 of the Act, the relevant parts of which read as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement



with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

• • •

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act.

34. At the hearing counsel for the Steep Rock Inn objected to the Board's considering the applicability of section 63 in these proceedings. In this regard, counsel contended that it was inappropriate to raise the issue in the context of these proceedings, since it was beyond the terms of the Minister's reference and further, in his view if the union had desired to raise the issue, the time to do it was shortly after the new owners had opened for business. We are unable to accept these submissions. Section 63(12) of the Act specifically empowers the Board to deal with the question of whether a business has been sold in a proceeding other than an application under section 63. In order to answer the questions posed by the Minister, we believe it necessary to consider the applicability of section 63. Further, we are unable to accept the contention that because the union did not file an application under section 63 when the Inn opened under new owners it is foreclosed from now relying on section 63. This conclusion is, however, separate from the question of whether its failure to do so at the time indicates an abandonment of its bargaining rights.

35. The Steep Rock Inn contends that there was not a sale of a business within the meaning of the Act since the new owners did not purchase anything from the owners of the Hotel Steep Rock but rather made their purchase from the Federal Business Development Bank. Further, it appears to be the Inn's position that all it purchased was certain assets and not a business. The Inn also relies on the fact that there was a period subsequent to the purchase prior to the opening of the Inn. In our view, the fact that under the relevant purchase documents the new owners of the Steep Rock Inn acquired assets formerly owned by the Hotel Steep Rock, as opposed to providing for a purchase of its "business", is not necessarily determinative. The Board has in numerous cases recognized that what is characterized as the sale of assets in commercial documentation may, in fact, involve a sale of a business within the meaning of section 63. See, for example, *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691. Similarly, it matters not whether a sale (which is defined in section 63 to include any transfer) is done through an intermediary such as a receiver. See: *Hamilton Cargo Transit Ltd.*, [1983] OLRB Rep. June 887. Section 63 has also been held to cover a series of dispositions so as to bind the ultimate purchaser. See: *Culverhouse Foods Inc. op cit.* The fact that an operation has been shut down for a lengthy period prior to being re-opened by new owners is a factor that suggests there has not been a transfer of a business, but only a transfer of certain assets. However, it is only one factor among many to be taken into account, and the Board has, in certain situations, concluded that there has been a continuation of a business and a sale notwithstanding the fact that the business has been shut down for a lengthy period of time. See: *Sisman's of Canada Limited*, [1980] OLRB Rep. July 1059.

36. We turn now to consider the facts of this case. Although there has been some

structural changes to the building and new carpets and furniture have been installed, the building in question continues to be used as a hotel or inn. Further, there is no evidence to suggest that the Inn has attracted, or seeks to attract, a different type of clientele than that which frequented the hotel before the sale. The same classifications of employees are apparently being utilized as was the case prior to the sale. Although there was no formal transfer of goodwill, the fact that the new owners continue to use the Steep Rock name suggests an attempt to capitalize on whatever goodwill the Hotel Steep Rock had. In all the circumstances, we are satisfied that there has, in fact, been a sale of a business by way of an intermediary, from the Hotel Steep Rock to the Steep Rock Inn (1979) Ltd. It follows, pursuant to section 63(2) of the Act, that the Steep Rock Inn continued to be bound by the terms of the 1979-1982 collective agreement.

37. Concerning the April 22, 1983 collective agreement, our reasoning with respect to the Valenca Restaurant also applies to the Steep Rock Inn. Local 893 was aware of the sale at the time it occurred and shortly thereafter became aware that the new owners did not regard the union as having bargaining rights. As early as April 11, 1980, the Local was complaining that the new owners had "not accepted the union and have not called back the union girls". There is a dispute in the evidence as to whether Mr. Rees, on behalf of Local 893, visited the Steep Rock in April 1980 and was told the Inn had nothing to do with the union, or whether he went to the Inn sometime between late 1980 and March 1982 but was unable to see the manager. In either event, nothing occurred which would have indicated to the union that the new owners had altered their position that they had nothing to do with the union. Accordingly, when the 1982 memorandum of settlement and the April 22, 1983 collective agreement were signed, the union was on actual notice that the Steep Rock Inn did not regard the union as having bargaining rights for its employees. Given the facts of this case, it is reasonable to infer that the Steep Rock Inn (1979) Ltd. was never a member of the Atikokan Hotel Association (assuming it was a formal employers' organization with members). The Steep Rock Inn did not itself execute the 1982 memorandum of settlement or the 1983 collective agreement. Accordingly, we are satisfied that neither document was binding on the Inn.

38. The contention that the union abandoned its bargaining rights was also raised with respect to the Steep Rock Inn. It will be recalled that on February 4, 1980 and again on March 27, 1980, the officers of Local 893 wrote to the new owners of the Inn seeking to enforce the Local's bargaining rights. On April 11, 1980, four grievances were filed against the Steep Rock Inn. If Mr. Balonyk's evidence is accepted, Mr. Rees visited the Steep Rock at the end of April 1980. Mr. Rees, however, testified he was at the Steep Rock at some later point in time, although he admitted he did not actually get to talk to anyone. Mr. Rees did not name the Steep Rock when he requested the appointment of a conciliation officer on September 7, 1982. It will be recalled that Mr. Rees testified that this was simply the result of an oversight resulting from the fact that he did not have all the names of the Atikokan hotels before him when he filled in the request form. No such explanation was advanced, however, to explain why the negotiating proposals prepared at about the same time by Local 893 referred to a number of establishments but not the Steep Rock Inn. Local 75 did not file a grievance against the Steep Rock on April 6, 1983 when it grieved against three other Atikokan establishments, although grievances were filed against the Steep Rock on August 16, 1983. Given this evidence, the issue of whether the union ever abandoned its bargaining rights is not an easy one to decide. However, on balance, we are of the view that the evidence falls short of disclosing an actual abandonment of bargaining rights on the part of the union. Accordingly,

we are of the view that Local 75 continues to hold bargaining rights with respect to employees of the Steep Rock Inn. The Inn was not, however, bound to the terms of the April 22, 1983 collective agreement.

39. It will be recalled that the Minister in his reference posed the following questions to the Board, namely:

“... whether or not collective bargaining relationships exist between the employers and the trade union and if so, whether or not the agreement of April 22, 1983 is binding upon them.”

In the same order as the employers are listed on the reference, our answers to these questions are as follows:

#### The Little Falls Dining Room

No collective bargaining relationship exists between this employer and Hotel Employees Restaurant Employees Union, Local 75, and this employer was not bound by the April 22, 1983 collective agreement.

#### John The Sportsman Restaurant

A collective bargaining relationship does exist between this employer and Hotel Employees Restaurant Employees Union, Local 75. Further, this employer was bound by the April 22, 1983 collective agreement.

#### Rockton Hotel

A collective bargaining relationship does exist between this employer and Hotel Employees Restaurant Employees Union, Local 75. Further, this employer was bound by the April 22, 1983 collective agreement.

#### Valenca Restaurant

A collective bargaining relationship does exist between this employer and Hotel Employees Restaurant Employees Union, Local 75. However, this employer was not bound by the April 22, 1983 collective agreement.

#### Atikokan Hotel

A collective bargaining relationship does exist between this employer and Hotel Employees Restaurant Employees Union, Local 75. Further, this employer was bound by the April 22, 1983 collective agreement.



Steep Rock Inn

A collective bargaining relationship does exist between this employer and Hotel Employees Restaurant Employees Union, Local 75. However, this employer was not bound by the April 22, 1983 collective agreement.

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**2861-84-M International Union of Elevator Constructors, Local #50, Applicant, v. Montgomery Elevator Company, Respondent**

**Construction Industry Grievance - Province-wide construction collective agreement requiring use of applicant's members in assembly of elevators - Bona fide design change resulting in small part of assembly being done in plant - Whether use of non-members breach of agreement**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *I. M. Stamp* and *N. Wilson*.

**APPEARANCES:** *L. N. Gottheil*, *Ernest Shaw* and *Bob Heale* for the applicant; *R. Ross Dunsmore*, *C. C. White*, *A. Reistetter* and *H. Richards* for the respondent.

**DECISION OF THE BOARD;** November 14, 1985

1. This is the referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.
2. The grievance in question reads:

“Mr. B. Taylor,  
Montgomery Elevator Company,  
20 Lockport Road,  
Islington, Ontario.  
M8Z 2Z7

Local #50 International Union of Elevator Constructors, hereby grieves the actions of the Montgomery Elevator Company. In that it allowed, work that comes under jurisdiction of the International Union of Elevator Constructors, to be done by others, on a project known as Hastings Manor Nursing Home in Belleville Ontario.

Local #50 International Union of Elevator Constructors maintains that the installation by Montgomery Elevator Company of a one piece car sling is in violation of the Ontario Provincial Agreement Article #4, 401, 4, 02, 02.

As redress Local #50 International Union of Elevator Constructors demands that the Montgomery Elevator Company immediately stop all installations of the car sling in question, and that all hours worked on these slings be assessed, and the equivalent mechanic rate and fringe payment be made to Local#50, International Union of Elevator Constructors.

Ernest Shaw,  
Business Representative,  
Local 50, I.U.E.C.

c.c. J.W. Baxter  
A. Reistetter  
E. Shaw''

3. The "one-piece car-sling" referred to in the grievance is part of a standard-sized hydraulic lift developed by the respondent for use in low-rise residential or commercial buildings. The respondent normally sells 100 to 150 of these a year across Canada, all of which are manufactured in its plant in Ontario. Prior to the change now in dispute, the car-sling was delivered to the installation-site in pieces, and was bolted together by members of the applicant Union. This process took a crew of two men approximately 4 hours. The new form of sling, welded into one piece at the plant, requires an installation time for the two-man crew of three hours. The difference in work-time for each of the two crew-members, therefore, is one hour; the applicant recognizes this, but is concerned over what it views as an unlawful erosion of its work jurisdiction. It might be noted at this point that, while the assembly by bolts of the pieces of the old-style car-sling was clearly assigned by the company to the members of the applicant working in the field, there are other parts of the elevator, such as the pump, fan, doors and certain cylinders, which have always been assembled in the plant, including required welding. On the other hand, any tacking that had to be done *in the field* has always been done by one of a small number of ticketed welders in the membership of the applicant, or when such an individual is not available, by outside contractors under permit from the Local Union.

4. The evidence of the company was given by its Chief Engineer, Al Brown. He testified that the competition for sales in this area is extremely tight, and a spread of even 100 dollars in tenders can make the difference in being successful. The company was accordingly anxious to develop design changes which would allow it to offer its product at a more competitive price. What it came up with was a move to a much lighter gauge of steel in the fabrication of the car-sling itself. This produced a savings in material and transportation costs, and made available the use of a smaller, more economical motor.

5. The development of this new, lightweight swing was not without its production problems, however. Experimentation with the lower-gauge sheet metal showed a tendency to tear at the bolt-joints under the continual stress of the elevator. It was determined that this could be cured only by welding, rather than by bolting, the cross and vertical pieces of the sling. With the lower gauge metal, however, stricter standards of welding became essential than those the company had ever employed previously, and the company at the outset accordingly determined that this was a process which could only be carried out to the company's satisfaction in the plant itself. While there is nothing in the standards developed by the company with the Canadian Welding Bureau for this lower-gauge steel which specifically requires that the welding not be done in the field, from the company's point of view, only in-plant performance of these critical welds will ensure proper supervision and climate-controlled conditions to the extent which will make the company comfortable in certifying that the welding standards have been met. While not normally a function of an elevator mechanic or helper's work, welding tasks *have*, as noted, been performed on occasion by the small number of ticketed welders included in the applicant's membership, and the company concedes that these construction mechanics could ultimately be trained to meet the standards required for the new welds as well. The company further concedes that additional equipment could be

bought and moved to the field to permit performance of the welding at the site, and that additional supervision could be hired to approximate the degree of welding supervision present in the plant. The cost of such measures, however, would eliminate the very economies which prompted the new design, and would force the company to abandon the project. Given the prior assignment of sling-assembly to the constructors in the field, the issue before the Board is whether these cost and design considerations entitle the company, under the terms of the collective agreement, to implement the changes that it did.

6. The relevant provisions of the collective agreement begin with Article 2.01, which provides:

“2.01 The Employers recognize the Union as the exclusive bargaining representative for all Elevator Constructor Mechanics and Elevator Constructor Helpers, in the employ of the Employers engaged in the installation, repair, maintenance and servicing of all equipment referred to in Article 4.02 and Article 4(A).”

Article 2.02 then qualifies Article 2.01 as follows:

“2.02 The Union recognizes that it is the responsibility of the Employers, in the interest of the purchaser, the Employers and their employees, to maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product, ...”

That Article, however, is itself qualified by the concluding words:

“provided, however, that this provision is not intended to affect the work jurisdiction specified in Article 4 and Article 4(A), and the work jurisdiction as specified in other Articles of this Agreement.”

Article 4 and 4(A) in their material parts provide:

“4.01 It is agreed by the parties to this Agreement that all work specified in Article 4 shall be performed exclusively by Elevator Constructor Mechanics and Elevator Construction Helpers in the employ of the Employers.

• • •

4.02.02 *The erecting and assembly of all elevator equipment to wit: electric, hydraulic, steam, belt, dumbwaiters, residence elevators, parking garage elevators (such as Bowser, Pigeon Hole, or similar types of elevators), compressed air and handpower.*

• • •

4.02.10 *The assembly of all cabs complete.*

4.02.20 The setting of hydraulic power units (power units include motor, pump, drive valve system, internal piping, muffler, internal wiring, controller and tank). *Where power units arrive in parts, they shall be assembled at the job site.* The wiring and piping to and between multiple hydraulic power units shall be performed at the job site.

• • •

4.03.01 Nothing contained in Article 4 shall preclude the Employers from preassembling and prefabricating the following:



1. Temporary elevators
2. Residence elevators
3. Dumbwaiters
4. Dock Elevators
5. Parking garage elevators (such as Bowser, Pigeon Hole or similar types of elevators).

A temporary elevator is defined as a nonpermanent elevator installed prior to or during construction work inside or outside buildings. The assembly, disassembly and moving of temporary elevators from job to job or area to area may be accomplished in the most economical fashion, provided, however, whatever work is required to be performed at the job site in connection therewith shall be performed exclusively by Elevator Constructor Mechanics and Helpers. Residence elevators shall mean elevators installed solely for use in a single family residence and not for general public use. Single family residences may be part of a multi-unit structure.

• • •

4.09 The industry, including its employees and customers, will be served by full utilization of the latest methods, techniques, technologies, tools and equipment available including communications equipment. Therefore, no restrictions shall be imposed on their use.”

[emphasis added]

As well, the collective agreement in Article 2.03 provides:

“2.03 Without limiting the generality of the foregoing, and subject to the other provisions of the Agreement, the Employers shall have the right to:

- (a) Select personnel, hire, assign work or duties, transfer, layoff and recall employees;
- (b) discipline or discharge for just cause;
- (c) establish and enforce reasonable rules of conduct to be observed by employees.”

7. The present collective agreement is, of course, a *construction* agreement, negotiated between designated bargaining agencies under the province-wide bargaining provisions of the *Labour Relations Act*, and one of its principal themes, as one would expect from that, is that all erection and assembly of elevator equipment performed in the field is the exclusive work of the applicant herein. Assembly in the plant, on the other hand, has traditionally been performed by members of the Machinists’ Union employed by the respondent therein, and, as one would expect, without objection by the applicant. The present case essentially is concerned with the extent to which such assignment of “assembly” work is fixed; i.e., as forming part of the in-plant process, or the on-site process.

8. It is clear that the parties in their collective agreement have attempted to provide some measure of recognition for the interest of the industry as a whole in adapting to new and more efficient technical developments, against a backdrop of the entrenched jurisdictional claims of the applicant. The problem is that the language tends to reconcile these fundamentally conflicting interests in a way that qualifies any concessions virtually out of existence, at least insofar as the work jurisdiction of the applicant and its members are concerned. The best example of this is contained in Article 2.02, which provides once again:

"The Union recognizes that it is the responsibility of the Employers, in the interest of the purchaser, the Employers and their employees, to maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product, *provided, however, that this provision is not intended to affect the work jurisdiction specified in Article 4 and Article 4(a), and the work jurisdiction as specified in other Articles of this Agreement.*"

There is, however, no such qualification imposed on the language of Article 4.09, which, once again, reads:

"The industry, including its employees and customers, will be served by full utilization of the latest methods, techniques, technologies, tools and equipment available including communications equipment. Therefore, no restrictions shall be imposed on their use."

That language obviously has to be given some meaning by the Board, although presumably not a meaning which will render nugatory all of the other provisions of Article 4 of which it forms a part. Article 4.09 does, however, appear to reinforce the view that the permissible pre-fabrication spelled out Article 4.03.01 is meant simply to remove any doubt with respect to certain *classes* of elevators in general, and is not meant to be exhaustive on the overall question of new developments and techniques.

9. The applicant Union relies on a 1972 arbitration award in the United States by Mr. Eli Rock (*National Elevator Industry, Inc. v. International Union of Elevator Constructors*). The facts of that case are virtually identical to our own, and the arbitrator found that the language of the collective agreement before him required him to uphold the position of the Union. He wrote at page 5:

"NEI's repeated stress on new design (and the accompanying sales effort by Otis and its need for and success in obtaining a bigger share of the low-rise building market) cannot, in itself, be persuasive. The contract between the parties neither states nor can reasonably be read as providing that the fact of a new design or technological development is itself decisive with respect to such jurisdictional issues as may arise from the new design or technological development."

However, in saying that, the arbitrator was directing his attention solely to what was the equivalent of our own Article 2.02, about which he went on to say:

"To the contrary, Paragraph 2 of Article II is made up of two parts which are potentially on a collision course. Such a clause cannot reasonably be applied, in any situation which presents a conflict between the two objectives, by simply making either objective dominant over the other. To do so would amount to wiping out one or the other part of the provision. Rather, it is necessary to give due regard to both parts, and, on a case-to-case basis, balance the factors as is best possible in each individual case."

We have already noted our agreement with that view of Article 2.02. The arbitrator did not, however, appear to find relevant language somewhat akin to our 4.09. The language in the 1972 U.S. agreement read:

"Par. 9. No restrictions shall be imposed as to methods, tools, or equipment used.";

whereas, again, our language reads:

"The industry, including its employees and customers, will be served by full utilization of the latest methods, techniques, technologies, tools and equipment available including communications equipment. Therefore, no restrictions shall be imposed on their use."

It may be that the absence of such words as “the latest”, and “techniques” and “technologies” caused the arbitrator to not view the language of his agreement as pertaining to technical innovation or design change, as the language of the present 4.09 clearly does.

10. The applicant argues that no change in design has occurred in the present case; that nothing new is being done here with respect to assembly of the elevator, other than the *place* where the respondent is choosing to have it done. On the evidence before us, we cannot accept that. The development of a new style of car-sling which can utilize the advantage of lighter-gauge metal is, in this case, a *bona fide* change in design, and it is that technical achievement itself which has led the respondent to alter the situs of one stage of the assembly process. The evidence further satisfies us that without that change in situs, the new technology of lighter-gauge slings could not be utilized in a way that would produce a lower cost product for the industry. We agree with Mr. Gottheil that the work-jurisdiction protections of the collective agreement cannot be read as meaning the employer must comply with the agreement unless it is cheaper not to do so; but the presence of a *bona fide* technological design change brings into play in this case the provisions of Article 4.09 of the agreement, and that, balanced against the marginal nature of the welding function heretofore performed by a very small proportion of the applicant's members in the field, and the existence of various examples of other welding assembly historically being performed in the plant, convinces us that the respondent has acted here within the rights contemplated by the parties' collective agreement. Had the respondent simply chosen, for economic expediency, to continue the use of the old-style car sling but to have its pieces bolted together in the plant, different considerations would arise. And obviously, as well, the result herein takes into account the fact that, as in the case of power-unit assembly covered by Article 4.02.20 of the collective agreement, to the extent that the new form of car sling *does* arrive at the site in pieces, the assembly of such pieces is assigned wholly to members of the applicant union.

11. The grievance is accordingly dismissed.

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**1929-85-U Canadian Union of Restaurant and Related Employees Local 88 (AFL-CIO-CLC), Applicant, v. O'Tooles Food Corporation c.o.b. O'Tooles Roadhouse Restaurant (Barrie), Respondent**

**Lockout - Restaurant closed and employees terminated shortly after certification application filed - Closure not discussed with union - No evidence that closure conditional or temporary - No lockout although may constitute other unfair labour practices**

**BEFORE:** *Owen V. Gray*, Vice-Chairman.

**APPEARANCES:** *Alick Ryder, Q.C.* and *Thomas L. Rees Jr.*, for the applicant; *S. A. Bernofsky, Gordon Metcalfe* and *Erik Fish* for the respondent.

**DECISION OF THE BOARD;** November 5, 1985

1. This is a complaint under section 93 of the *Labour Relations Act* alleging that the respondent has effected an unlawful lockout.

2. On August 2, 1985, the applicant trade union applied to be certified as bargaining agent for full-time and part-time employees of the respondent at its restaurant in Barrie, Ontario. On October 7, 1985, a differently constituted panel of the Board directed that representation votes be conducted. On October 25th, representatives of the applicant and respondent met and made tentative vote arrangements. Within days thereafter, the respondent closed the subject restaurant. Before it occurred, the possibility of the restaurant's closing had not been discussed or revealed to the union, either at the meeting of October 25th or otherwise in connection with its certification application, or in collective bargaining with respect to other O'Tooles Restaurant operations for which the applicant has been certified or at all. When he attended at the restaurant premises on October 30th, the trade union's organizer found the doors locked and a handwritten sign on them saying simply that the restaurant was no longer open.

3. A principal of the respondent was served with a summons which required him to bring with him certain documents. Those documents relating directly to the subject restaurant were produced for the inspection of counsel. With respect to financial records of other O'Tooles Restaurants under the control of principals of the respondent, I ruled that they would have to be available for production, but that they would not have to be produced for inspection before financial considerations were put directly in issue. Counsel for the respondent conceded as a fact that the respondent had no reports, memoranda, correspondence, minutes of meetings or other documents of any kind leading up to and relating to the decision to close the subject restaurant, other than its financial statements which had been produced. No employee or member of management was called as a witness by either party.

4. Section 75 of the Act provides that:

No employer or employers' organization shall call or authorize or threaten to call or authorize an unlawful lock-out and no officer, official or agent of an employer or employers' organization shall counsel, procure, support or encourage an unlawful lock-out or threaten an unlawful lock-out.

There is no question that a lock-out by the respondent at this time would be unlawful. "Lock-out" is defined by section 1(1)(k) of the *Labour Relations Act* as follows:

“lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees;

The Board’s decision in *Preston Spring Gardens Retirement Home*, [1984] OLRB Rep. Sept. 1241 was cited in argument, and I adopt what was said in paragraphs 15 and 16 of that decision:

15. A “lock-out” is a form of economic sanction undertaken by an employer to modify his employees’ behaviour. It is a bargaining posture with both subjective and objective elements. In the first place, there must be a withholding of work opportunities: “a closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees”. Secondly, (although often much more difficult to determine), there must be a subjective intention to compel or induce his employees (or some of them) to refrain from exercising rights or privileges which they enjoy the *Labour Relations Act*, or to agree to changes in their terms and conditions of employment. Both elements must be present if the conduct in question is to be characterized, legally, as a “lock-out”.

16. The termination or lay-off of employees does not, in itself, constitute a lock-out even though the consequences for employees may be the same, nor is it sufficient that the employer was motivated by anti-union animus, if his intention was not to preserve the employment relationship of at least some of his employees on terms more favourable to himself. As the Board noted in *Doral Construction Limited*, [1980] OLRB Rep. March 310, a mass termination of employees in favour of sub-contracting the work (there in response to a union organizing campaign) may be clearly illegal, yet still not constitute a “lock-out”. What is critical, is the *specific* motive behind the employer’s action, and, in particular, whether his intention is to preserve the relationship with his employees (or some of them) on different and more favourable terms. In the absence of such specific intent, the employer’s conduct is not a “lock-out” even though it may be an unfair labour practice or contrary to the terms of a collective agreement. That is why the Board has often held that a clear, final, unequivocal, and irrevocable decision to dispense with the services of some employees would not be a “lock-out” because the employer has no intention of preserving existing employment relationships on different terms or inducing employees to give up established rights. To reiterate: it may be an unfair labour practice, but it will not be an unlawful lock-out.

5. When an application is filed under section 93, the onus is on the applicant to show that a lock-out has been effected or threatened. This requires proof of the elements referred to in the two paragraphs I have just quoted and, particularly, proof of the specific intent referred to in the second of those two paragraphs. The applicant has failed to prove that intent. There is no direct evidence of the respondent’s intent. The sign on the restaurant door gives no indication that the closing is temporary. There is no evidence the employees were told their layoffs were temporary. The employer’s silence about this restaurant’s closing during collective bargaining is inconsistent with an intention to influence employees in organized units. There is no evidence of its discussing the subject with employees in unorganized units. While I am prepared to draw from the evidence an inference that the respondent’s decision was made and implemented with unseemly haste, I cannot go so far as to find from that the specific intent necessary to support a declaration under section 93. What the respondent has done may or may not constitute some other unfair labour practice. I am not called upon or authorized to decide that. On the facts before me, it has not violated section 75.

6. Accordingly, this application is dismissed.

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**1465-85-R; 1466-85-R; 1467-85-U** United Steelworkers of America, Applicant/Complainant, v. **Plaza Fiberglas Manufacturing Limited** and **Plaza Electro-Plating Limited**, Respondents

**Practice and Procedure - Employer refusing to post notices to employees or to permit entry to Board officers as directed by Board order - Union requesting Board to state case for contempt under Statutory Powers Procedure Act - Whether hearing required before Board exercises discretion - Board determining appropriate content of stated case**

**BEFORE:** *Owen V. Gray*, Vice-Chairman and Board Members *F. C. Burnet* and *W. F. Rutherford*.

**DECISION OF THE BOARD;** November 12, 1985

1. By letter dated November 6, 1985, the applicant/complainant asks that we state a case to the Divisional Court under section 13 of the *Statutory Powers Procedures Act*, R.S.O. 1980, c. 484. which provides:

Where any person without lawful excuse,

- (a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or
- (b) being in attendance as a witness at a hearing, refuses to take an oath or to make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his power or control legally required by the tribunal to be produced by him or to answer any question to which the tribunal may legally require an answer; or
- (c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on application of a party to the proceedings, state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the tribunal or by such party, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

2. The proceedings in which this request is made are: an application for certification as exclusive bargaining agent for a bargaining unit of employees of the respondents in the Municipality of Metropolitan Toronto, an application for a declaration under subsection 1(4) of the *Labour Relations Act* that the respondents be treated as one employer for the purposes of that Act, and a complaint under section 89 of that Act alleging that members of the managements of the respondents reacted to the applicant/complainant's organizing campaign by interrogating and intimidating employees about union activities, engaging in surveillance



of the site of a union meeting to which certain of their employees had been invited, and terminating a number of employees because of their suspected involvement in union activity.

3. When these two applications and complaint came before us on October 4 and 10, 1985, the respondents argued that the Ontario Labour Relations Board had lost jurisdiction in these matters because the Board's officials had entered the respondents' premises without their permission to post notices to their employees of the two applications. Their counsel led evidence that the respondents had refused to comply with the Board's usual directions to post the Board's notices and, further, had refused access to their premises by a Labour Relations Officer duly authorized by the Board to enter those premises to post the required notices. The Board's officer eventually gained entry with the assistance of a sheriff's officer, and certain of the Board's notices were then posted. The arguments constructed on this foundation by the respondents' counsel are set out and dealt with in our decision of October 22, 1985, and need not be reviewed here. We found no merit in any of the respondents' challenges to the jurisdiction of the Board and this panel. We concluded that an officer authorized by the Board to enter premises and post notices therein does not require the occupant's permission to do so. We also concluded that it was within the Board's power to require posting of the notices in question, and rejected the respondents' arguments that the notices had been inherently defective in form or content.

4. For reasons set out in our decision of October 22nd, we found it necessary to give further notice of these proceedings to the respondents' employees. We extended the terminal date in both applications to November 5th, directed the Registrar to prepare new notices and forward copies thereof to the respondents with our decision, and gave the following directions:

48. We further direct that the respondents post the notices which accompany this decision immediately upon their receipt and keep them posted upon their respective premises at 4420 and 4440 Chesswood Drive and 70 Vanley Crescent, in conspicuous places where they are most likely to come to the attention of all employees who may be affected by the applications referred to therein, until the expiration of the terminal date for the applications.

49. Stuart Netherton and James Bowman, Labour Relations Officers, are each hereby severally authorized to enter the respondents' said premises from time to time during the normal business hours to view all documents posted therein and interrogate any person found in the premises to determine whether the Board's aforesaid notices have been and remain posted, and, if those notices have not been or do not remain posted, to post further copies thereof, and to continue to do as authorized hereby until the expiration of the terminal date in the applications to which the notices relate, and to report to the Board on the results of their attendances. The authority of either of the two aforesaid persons to do as he has been hereby authorized does not require that he be accompanied by the other of the two.

50. We further direct that the respondents complete and file by the aforesaid terminal date the Schedules to the Form 4 Notices they received September 18, 1985, and the specimen signatures required by Form 4.

5. The respondents have not applied to us for reconsideration, nor to the court for judicial review, of our decision of October 22nd.

6. Labour Relations Officer Stuart Netherton has filed written reports on two attendances at the respondents' premises. In his report on his attendance on Friday, November 1, 1985, he indicates that Mr. Chelminsky, the respondents' general manager, then acknowledged having read the Board's decision of October 22nd, refused to say whether the

Board's notices had been posted and obstructed Mr. Netherton's then unsuccessful attempt to gain access to the respondents' premises for the purposes contemplated by our authorization. In his report on his attendance the following Monday, November 4th, this time accompanied by sheriff's officers, Mr. Netherton indicates that despite Mr. Chelminsky's having then continued to behave as he had on November 1st, he managed to enter all three subject locations, determined that the Board's notices were not posted therein, and posted further copies of the notices.

7. As of the date hereof, the respondents have not filed the material we directed them to file in paragraph 50 of our decision of October 22nd.

8. In a letter dated November 5, 1985, counsel for the applicant/complainant refers to an inquiry he made to the Registrar by telephone concerning the status of the Board's efforts to give notice to the respondents' employees, to which the Registrar appears to have responded (quite properly, in our view) by advising counsel of the essential details of Mr. Netherton's reports. In that letter counsel submits that the Board should further extend the terminal date in the applications, direct further posting of notices to employees and extend the authorization in paragraph 49 of our decision of October 22nd. That letter has been circulated to the respondents with a direction that they file their submissions thereon, if any, by November 15th.

9. In his letter of November 6th requesting that the Board state a case to the Divisional Court under section 13 of the *Statutory Powers Procedures Act*, counsel for the applicant/complainant says:

The applicant asks that the Board set out the facts as contained in the decision dated October 22, 1985 and further facts as outlined above which have occurred since the Board's decision dated October 22, 1985 with respect to the further necessity to seek assistance from the Sheriff's Office to enable the Board Officer to post the Notices as directed in the Board's decision dated October 22, 1985.

As a result of the failure by the respondents to post the Notices in accordance with the Board's order, Notices were not posted sufficiently in advance of the new extended terminal date ordered in the Board's decision of October 22, 1985 to give the employees in the affected bargaining unit sufficient notice of the applications pending. As a result, by letter dated November 5, 1985 the applicant felt compelled to ask the Board to extend the terminal date again. This is the fourth extension of the terminal date in this matter. The applicant further asked the Board to authorize its Officers to attend at the premises of the respondents in order to verify that the Notices were and remained posted and to do a check on a daily basis until the expiry of the requested extended terminal date.

The conduct of the respondents, it is submitted with respect, makes a mockery of the Ontario Labour Relations Board and of the Rule of Law. It is our respectful submission that the conduct of the respondents is a proper subject upon which the Board should state a case as requested herein so that the court may inquire into the matter and take any action which the court deems appropriate in the circumstances.

10. Section 13 of the *Statutory Powers Procedures Act* provides that the Board "may" state a case on application of a party to proceedings before it. The first question we face is whether it is necessary to hold a hearing or otherwise involve the respondents in our decision on the exercise of that discretion. The necessity of so doing turns on the nature of the process contemplated by section 13. In another context, the stating of a case is something a judicial decision-maker does in connection with a summary process of appeal from his decision. The case stated includes the decision-maker's findings of fact made after hearing the parties'

evidence and argument; the appeal court to which the case is stated does not retry those facts. The stating of a case of that sort is necessarily preceded by a hearing into the facts set out in the case stated. When one reaches the words "state a case" in section 13, that sort of process may come to mind. On reading the balance of section 13, however, it is apparent that the process it contemplates is quite different from the stated case procedure with which the criminal bar is familiar.

11. Under section 13 of the *Statutory Powers Procedures Act* the Divisional Court deals with the alleged contempt as a trial court; it is that court, and not the tribunal stating the case, which has the sole jurisdiction to determine whether there has been a contempt and what punishment will be imposed on the contemnor. The substantially identical provisions of section 8 of the *Public Inquiries Act*, R.S.O. 1980, c. 411, were considered by the Ontario Court of Appeal in *Re Yanover and Kiroff and The Queen*, (1975), 6 O.R. (2d) 478, where at page 483 Mr. Justice Estey observed that the tribunal's stated case is akin to "an information but one which constitutes *prima facie* but not conclusive evidence of the impropriety alleged ... an information on which the person affected is to be tried by the Divisional Court and if found guilty to have imposed upon him punishment." Accordingly, a decision to state a case does not involve a conclusive adjudication of the respondents' rights or of the facts on which its liability may depend. While the respondents will bear the burden of adducing evidence to explain or contradict any facts alleged in the stated case, they are not precluded from contradicting any of those allegations in the evidence they lead before the Divisional Court. Having regard to the principles discussed in *Minister of National Revenue v. Coopers and Lybrand* (1979), 92 D.L.R. (3d) 1 (S.C.C.), it does not appear to us that it is necessary to hold a hearing or otherwise involve the respondents in our decision on the exercise of our discretion to state a case at the applicant/complainant's request. We consent to the Board's stating a case to the Divisional Court under section 13 of the *Statutory Powers Procedures Act*.

12. The final question to be dealt with is the content of the case to be stated by the Board. There can be no doubt that it should include the relevant facts recited in our decision of October 22, 1985. It should also recite the directions given in that decision, the fact that those directions were communicated to the respondents and the fact that the respondents have not complied with the direction in paragraph 50 of our decision of October 22, 1985.

13. Should the stated case also set out the relevant contents of the Labour Relations Officer's reports on his attendances of November 1 and 4, 1985? When he attended at the respondents' premises, the Labour Relations Officer was exercising a power conferred on the Board by subparagraph 103(2)(e) of the *Labour Relations Act*. Pursuant to subparagraph 103(2)(g) of that Act, the Board can and did authorize the officer to exercise the Board's powers under subparagraph 103(2)(d) "and to report to the Board thereon." That provision of the Act would be of little use unless the Board could receive and, in appropriate circumstances, act on such reports. The Board is not called upon to make any binding determination of fact. It is only called upon to select the allegations of fact which the respondents should be required by the Divisional Court to answer. In this case, the allegations put before the court by this Board should include the allegations in the reports of its officer, Mr. Netherton, on his attendances at the respondents' premises on November 1 and 4, 1985.

14. Accordingly, the Board will state a case to the Divisional Court under section 13 of the *Statutory Powers and Procedures Act* in the terms contemplated by this decision.



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**0848-85-U** Royal Conservatory of Music Faculty Association, Complainant, v. Governing Council of the University of Toronto (**Royal Conservatory of Music**), Respondent

Duty to Bargain in Good Faith - Unfair Labour Practice - Employer refusing to negotiate programme for separation of conservatory from faculty - Union entitled to propose any matter not illegal for inclusion in agreement - Refusal to discuss on basis of intrusion on management right constituting bad faith bargaining - Employer required to respond with explanation to any proposal not illegal - Duty to discuss not to agree - Duty of employer to provide information not co-extensive with union's right to make proposals - Refusal to negotiate pending outcome of complaint before Board also bad faith bargaining

**BEFORE:** *S. A. Tacon*, Vice-Chairman, and Board Members *R. J. Gallivan* and *S. O'Flynn*.

**APPEARANCES:** *H. Goldblatt*, *C. Michael Mitchell*, *S. Barrett* and *Irene McLellan* for the complainant; *B. W. Binning* (on August 19, 1985), *M. Contini* (on September 11, 12) and *John Parker* for the respondent.

**DECISION OF S. A. TACON, VICE-CHAIRMAN, AND BOARD MEMBER S. O'FLYNN;** November 27, 1985

## I

1. This is a complaint alleging violation of sections 15, 64 and 79 of the *Labour Relations Act*. The parties agreed that the alleged contravention of section 79 should be adjourned *sine die*. Having regard to that agreement, the Board hereby consents to adjourn this allegation *sine die* for a period not exceeding one year. Unless within that time the parties request that the Board proceed with the matter, it will be terminated. With respect to the other allegations, in brief, the complainant asserts that the refusal by the respondent to negotiate with respect to certain proposals, to disclose specific information as requested and to continue negotiations on other matters pending the resolution of this complaint contravenes sections 15 and 64 of the Act.

2. The parties also agreed that evidence before the Board would consist of documentary material only; no *viva voce* evidence was called. The documentation included two accounts of some five negotiating meetings, one set taken by the complainant and the other by the respondent. Counsel agreed that the minutes were substantially similar and that any discrepancy should be resolved by the Board without the benefit of *viva voce* testimony regarding those minutes and meetings. It is appropriate to note here that, in fact, counsel in argument generally referred to the minutes tendered by the other party.

3. The Board indicated, in response to the complainant's request for a decision with

reasons to issue later, that the Board would reserve on that request. After review of the matter, the Board has determined that it would not be helpful to accede to the complainant's request and, accordingly, the Board's decision and reasons are set out herein.

4. The Board does not intend to detail the voluminous documentation entered as evidence. The material, as noted, was submitted on agreement of the parties. Nevertheless, it is necessary to sketch the factual background. More detailed references to the facts, as reflected in the documentation, are made throughout, as appropriate.

5. The respondent is the Governing Council of the University of Toronto, for convenience, referred to as the "university". While the precise organizational structure of the university was not placed in evidence, it is common ground that a number of committees report to the Governing Council and, further, there is what could be termed an "administrative" hierarchy, culminating with the president. The complainant is the Royal Conservatory of Music Faculty Association, again, for convenience referred to as "the union". The union was certified by the Board; the certificate is dated October 26, 1984. Notice to bargain was given by letter dated November 14, 1984. The instant complaint was filed July 5, 1985.

6. The Royal Conservatory of Music, founded in 1886 and affiliated with the university in 1896, is recognized as a prestigious institution with a long tradition of offering instruction in music. The university assumed complete control of the Conservatory, including rights to the name, pursuant to the *Royal Conservatory of Music of Toronto Act, 1954*. The Faculty of Music at the University of Toronto was first established in 1918. In the context of an enormous simplification which is not intended to slight the quality, breadth or diversity of either body and its respective activities, the Conservatory may be described as an institution offering music as an avocation to children and adults while the Faculty offers music studies to students as a professional faculty within the university.

7. In January 1983, a committee was established to review the organization and operation of the two divisions with the objective of rationalizing resources and developing a general plan for the integration of the programs, services and resources of the Faculty of Music and the Royal Conservatory. Although the Board need not go into detail, it should be noted that this was the third official review of the relationship between the Faculty and the Conservatory since 1973.

8. The committee released a brief interim report in June 1983 which still spoke of the overall objective of integration. A summary for discussion, issued in December 1983, however, suggested formal separation of the Conservatory and the Faculty of Music in the context of a transitional period of, perhaps, ten years followed by negotiations between the university and the Conservatory with respect to matters such as the right to the name "Royal Conservatory of Music", the Frederick Harris Music Company, etc.

9. To describe the ensuing debate within the university and the faculty association as vigorous, wide-ranging and heated is an understatement. The summary for discussion is more appropriately characterized, to use a colloquialism, as a "bombshell". In the early months of 1984, written responses to the summary for discussion were produced by the faculty association and the Conservatory assembly (an academic council). Moreover, on March 13, 1984, the faculty association applied to the Board for certification. As noted, the formal certificate issued in October 1984.

10. The final report of the committee was released in June 1984. It is appropriate to set out the following excerpt from that report:

Precis and Summary of Recommendations

This report is the result of eighteen months of deliberations. In December 1983 we issued a "Summary for Discussion". Our position has evolved as a result of the reactions to that discussion paper. This report is the final report of the committee and supersedes all other documents.

Our study of the history and present relationship of the Royal Conservatory of Music and the Faculty of Music of the University of Toronto has led us to believe that they should not be integrated. We have considered and rejected various models of integration including integration in the person of a single Dean, complete programmatic integration, and intermediate models that would achieve partial integration. We have concluded that the Conservatory should be separated from the University. It is our conviction that separation will be to the advantage of both units. We believe that apart they can flourish independently while remaining partners in music studies in Toronto.

Before complete separation occurs, we are recommending that a series of specialized reviews beyond our competence be conducted. These reviews will assess the present situation and, in their reports, provide a more detailed framework for the future of the two institutions.

Our recommendations concerning an independent Conservatory are based on the following premises:

- 1) The University will not sever the connection until it is satisfied that the Conservatory is able to function independently.
- 2) Accommodation will continue to be provided for the current programmes and level of activity either in McMaster Hall or in a new building.
- 3) The Conservatory will be governed by a strong, independent Board that will be responsible for all financial matters, be the employer of all staff associated with the Conservatory and be responsible for all its programme including the graded examination system.
- 4) The Conservatory will assume ownership of the Frederick Harris Music Co. Limited.

Our major recommendations are two:

- 1) That the Royal Conservatory of Music become independent of the University taking with it the name and all programmes and activities that are now under the direction of the Conservatory.
- 2) That early in the process of disengagement the following reviews be undertaken concurrently:
  - i) Of the undergraduate programme of the Faculty with particular emphasis on the degree in performance, if possible in conjunction with the anticipated graduate review.
  - ii) Of the teaching in the Conservatory.
  - iii) Of the Graded Examination System.
  - iv) Of the Branch Operation of the Conservatory.



v) Of the organization of the Conservatory.

Our other recommendations flow from these:

- 3) That an implementation Committee be appointed immediately to oversee the interim period.
- 4) That immediate steps be taken to appoint a Principal for the Conservatory.
- 5) That the Governing Council of the University name an interim Board of the Conservatory as soon as possible.

11. It is also necessary to refer to another important issue during this period. A different university review committee had resulted in a Report on Campus Development Potential in March 1983. There was considerable concern amongst the faculty at the Conservatory, in particular, that the university was actively considering relocating the Conservatory from its facilities at McMaster Hall. In June, 1983, a letter from President Ham to Principal Schabas stated that the development possibilities were not connected with the committee then reviewing the relationship between the Conservatory and the Faculty of Music. Further, the letter assured the Principal that any development scheme with respect to McMaster Hall should essentially ensure that any new facility for the Conservatory would satisfy the space requirements of the current programmes and enrolment, be near the Faculty of Music and accessible to Conservatory students. The Board notes that the Conservatory, in addition to the main building at McMaster Hall, operates through a number of branches located throughout the greater Metropolitan Toronto area.

12. Following the final report recommending separation of the Conservatory from the university, the debate intensified. The faculty association submitted a formal written response to the final report in September 1984 basically opposing separation. Acting Principal Dodson, in a letter to F. Iacobucci (Vice-President and Provost) dated October 4, 1984, (and subsequently circulated to Conservatory faculty) concurred with the recommended separation, although disagreeing with two of the committee's premises. The letter, however, also outlined a number of asserted preconditions to separation dealing with the separation process, various reviews, the ownership of assets, location and a recommendation that a collective agreement first be negotiated with the newly certified union.

13. The university's position on the report may be summarized by reference to a letter of December 15, 1984 from R. N. Wolff (Vice-Provost Professional Faculties):

**Stage I General Recommendations through Governing Council**

Jan. and Feb. 1985	Draft recommendations prepared by the University administration and taken to the Planning Subcommittee, the Assembly of the RCMT and the Council of the Faculty of Music for discussion. These recommendations will request approval in principle for creation of an independent RCM by July 1, 1986.
March 1985	Recommendations to the Academic Affairs and Planning & Resources Committees, where appropriate.
May 1985	Recommendations to Governing Council and, if approved, a decision on the future structure of the Royal Conservatory.

### **Stage II Detailed Recommendations through Governing Council**

June - Sept. 1985	Committee(s) to develop Presidential recommendations outlining the details of the legal organization, the resources committed and the nature of any future relationship with the University of Toronto.
Oct. - Dec. 1985	Recommendations through various committees of Governing Council, and a final decision by the Council.

### **Stage III Creation of the Legal Organization**

Jan. - May 1986	Action by the Ontario Legislature and/or other appropriate bodies to create the new organization.
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### **Stage IV "New" Royal Conservatory in place by July 1, 1986.**

14. Concurrently with this process, the university and the union commenced negotiations for a first collective agreement. At the first such meeting on December 7, 1984, M. Mitchell, as chief negotiator for the union, asserted the union's position that it wished to bargain directly about the separation process itself and opposed a mere "consultative" role for the "faculty". (Although this bargaining session preceded the university's "position" just quoted, there had been written confirmation on December 1, 1984, of an earlier meeting wherein the university's stance had been outlined in more general terms.) J. Parker, chief negotiator for the university, responded that it was solely the university's responsibility to deal with divestment.

15. Pursuant to the timetable outlined in paragraph 13, several committees and sub-committees were struck to examine various aspects of divestment, including administration and finance, governance and curriculum. Members of the faculty and administrative staff were included on the ad-hoc committees. By late January, the administration's recommendations to the Planning Sub-committee were (in part) as follows:

... The Council of the Faculty of Music and the Assembly of the Royal Conservatory are being asked for their views on this administrative response as well. We also believe that interested individuals and groups outside the University of Toronto must play an active role in determining the future of the Conservatory. To this end we propose a three-stage decision-making process as follows:

- 1) Approval in principle from the Governing Council for the creation of an independent Royal Conservatory of Music.
- 2) Approval from the Governing Council for the corporate structure and resources made available to the Royal Conservatory of Music. It will also be necessary to develop a long term affiliation agreement between the Royal Conservatory and the University which addresses the programmatic interaction between the Faculty of Music and the Royal Conservatory and provides the Royal Conservatory with appropriate physical facilities.
- 3) Recommendation of Governing Council to the Ontario Legislature for the enactment of a special statute for the creation of the Royal Conservatory.

The administration believes that the action in (3) is important to the future well being of the Conservatory but, if the Legislature fails to act on the recommendation, the University will create the new corporation.

This three-stage decision-making process should provide the members of the Governing Council, the University administration, teachers and students of the Conservatory

and the University community generally, as well as the public at large, the opportunity to ensure that the Royal Conservatory will have a strong and viable future. This process will also allow adequate time for consultation with appropriate individuals as detailed recommendations are developed. . . .

• • • •

. . . We believe that each of the reviews recommended for the Royal Conservatory should be undertaken, but they should be done under the direction of the Board of Directors of an independent Royal Conservatory of Music. To provide Governing Council and the administration with the assurances that the Royal Conservatory is able to function independently, we will ask the current administration to develop a business plan for the Conservatory. The review recommended for the undergraduate programme in the Faculty of Music will be conducted within the context of a strategic planning exercise to be initiated by the Dean of the Faculty.

The committee also recommended the immediate appointment of a Principal for the Conservatory and the creation of an interim Board of the Conservatory. The appointment of a permanent Principal should be left to the Board of Directors of the new Royal Conservatory of Music. The administration must, however, ensure that the Conservatory does have strong leadership during the period of decision. To this end the administration will recommend the appointment of an acting Principal with a term ending June 30, 1986. The President will also appoint an Advisory Board of the Royal Conservatory whose membership will be primarily drawn from outside the University.

#### Recommendations

The administration recommends the following motions for the approval of Governing Council:

- (1) The University of Toronto will take action to create an independent Royal Conservatory of Music by July 1, 1986. This organization should take the form of a Corporation without Share Capital to be controlled by a Board of Trustees. The Corporation will have control over all programmes and diplomas presently offered by the University through the Royal Conservatory of Music.

It is understood that this recommendation will be referred to the Planning and Resources Committee of Governing Council with concurrence by the Academic Affairs Committee.

- (2) The Corporation will have control of the following assets currently owned by the University of Toronto:
  - the Frederick Harris Music Company Ltd.
  - the physical facilities housing the branch operations of the Royal Conservatory
  - the musical instruments and business equipment located in all branches of the Royal Conservatory
  - all funds and assets held in trust for the Royal Conservatory.
- (3) The University of Toronto will provide the Corporation access to McMaster Hall or equivalent facilities.
- (4) The University will request an Act of the Legislature of Ontario to establish the new Corporation.

The implementation of these motions is subject to subsequent approval by the Governing Council of the following:



- a) the details of the Corporate structure,
- b) the detailed listing of all assets provided to the Corporation, and
- c) an affiliation agreement between the University of Toronto and the Corporation outlining the nature of programmatic interaction and the provision of facilities for the Corporation.

16. No negotiating meetings were held in the period from January to March 1985. The union, though, was not unaware of developments. In response to a written request, Parker informed Mitchell that the following motion would be placed before the Governing Council on April 18, 1985.

THAT, in principle, the University of Toronto take action to create an independent Royal Conservatory of Music by July 1st, 1986. This organization should take the form of a Corporation without Share Capital to be controlled by a Board of Trustees. The Corporation should have control over all programmes and diplomas presently offered by the University through the Royal Conservatory of Music.

In principle,

1. THAT the Corporation have control of the following assets currently owned by the University of Toronto:
  - the Frederick Harris Music Company Ltd.;
  - the physical facilities housing the branch operations of the Royal Conservatory;
  - the musical instruments and business equipment located in all branches of the Royal Conservatory;
  - all funds and assets held in trust for the Royal Conservatory.
2. THAT the University of Toronto provide the Corporation access to McMaster Hall or equivalent facilities.
3. THAT the University request an Act of the Legislature of Ontario to establish the new Corporation.

17. The union then contacted each member of the Governing Council in writing, outlining its objection to approval of divestment other than in principle at the April 18 meeting. Attached to this letter was the union's position on separation (herein after referred to as "the 9 point programme"), as follows:

#### THE FUTURE OF THE ROYAL CONSERVATORY OF MUSIC

##### A PROGRAMME FOR SEPARATION

The Faculty of the Royal Conservatory of Music are not opposed in principle to the separation of the Royal Conservatory of Music from the University of Toronto. However, before separation can be approved the financial integrity and future home of the Conservatory must be assured; otherwise, the University will simply cast out the Conservatory from the University community to survive as best it can, if it can! Accordingly, we will support the separation of the two institutions if, and only if, the following conditions are met:

1. The name "Royal Conservatory of Music" shall remain with the new institution.
2. McMaster Hall shall remain as the home of the Royal Conservatory of Music.

3. All physical facilities housing the branch operations of the Conservatory shall remain with the Conservatory.
4. The musical instruments, business equipment and all other assets located in all the physical facilities now occupied by the Conservatory (including the bookstore) shall remain with the Conservatory. Satisfactory arrangements regarding access to the Edward Johnson Library shall be assured.
5. All rights to the examination system as it is currently administered by the Conservatory shall remain with the Conservatory.
6. All funds and assets held in trust for the Conservatory, including scholarships, etc. shall remain with the Conservatory.
7. The Frederick Harris Music Company Ltd. shall be transferred to the Conservatory following a financial review to ensure that this is in the best interests of the Conservatory.
8. Adequate financial arrangements to ensure the future of the Conservatory shall be in place prior to separation.
9. A satisfactory system of self-government for the new institution shall also be assured prior to separation.

18. At the second negotiating session of April 17, 1985, Mitchell formally tabled and reviewed the 9 point programme. That review included a number of requests for disclosure of information. Parker requested that the union table its entire package of proposals. Mitchell asserted that the other issues "paled" in comparison to divestment but indicated the remaining proposals would be forthcoming. Mitchell also objected to approval of separation, except in principle, by the Governing Council. Parker responded that the university was developing its position and, once developed, would communicate with the union. It should be noted that the union had agreed, through exchange of correspondence and without prejudice to its position overall in bargaining, that the university could negotiate individual contracts for 1985-86 academic year and that individual fees and subjects to be taught would not be renegotiated at the bargaining table.

19. By letter dated May 3, 1985, Parker informed Mitchell that the Governing Council had only approved separation in principle (paragraph 1 of the motion set out in para. 16 above); the remainder of the motion had been referred back to the executive committee. Parker reiterated his request for the remainder of the union's proposals. Mitchell's reply of May 7, 1985 rejected the postponement of negotiations on separation (and disclosure of the requested information) pending completion of the union's demands. By letter dated May 17, 1985, Parker confirmed the date for the next bargaining meeting and stated:

For purposes of clarification, we would advise that our position is that divestment of the Royal Conservatory by the University of Toronto is not negotiable. However, we will continue to discuss and negotiate any issue relating to terms and conditions of employment for members of the Faculty Association at the Conservatory.

20. At the negotiating meeting of May 22, 1985, Parker reiterated the university's position that separation was non-negotiable and that information related to divestment (e.g., financial documents concerning the Frederick Harris Music Company) would not be disclosed. Parker, as a matter of information only, did respond to some matters raised in the 9 point

programme, for example, by stating that the Conservatory would retain the name “Royal Conservatory of Music” subsequent to separation. Parker acknowledged that location could affect employment conditions but confirmed there would be no negotiations on McMaster Hall itself. Mitchell continued to press for direct negotiations on the union’s proposals already tabled and raised the possibility of legal action. Although noting that the university intended to consult widely before reaching its decisions on separation and that the union would be kept informed of developments, Parker stated the university would not negotiate those matters with the union.

21. The next bargaining session was June 3, 1985. Both parties reaffirmed their respective positions and with specific reference to the issue of location. Parker stated he was not able, at that point, to discuss details of a proposed implementation committee. The union tabled and reviewed its remaining proposals and sought additional information. In response to Mitchell’s request, Parker indicated the university was working on their proposals. Finally, Mitchell informed Parker that a legal complaint might be forthcoming but the union considered that the discussions on other matters should continue in any event. Parker replied that he intended to negotiate a collective agreement and discussions would continue, although he would need to take instructions from his principals.

22. At the June 25, 1985 negotiating meeting, Parker reviewed the university’s process for implementing the recommended divestment of the Conservatory. An implementation committee, to which two *ad hoc* committees (resources; corporate structure and governance) would report, would be struck to produce an implementation plan. A representative of the union would sit on the implementation committee. Two advisory committees (one to the Provost; one to the Principal) would also be created. Faculty of the Conservatory would be represented on the Principal’s Advisory Committee. The report of the implementation committee would be reviewed by the Provost’s Advisory Committee and the Provost and, after approval of the President, would go to the Governing Council. The union would be notified of the recommendations and could make representations to Governing Council. Parker confirmed the university’s position on the non-negotiability of divestment and, indeed, of the implementation plan. The union, too, reiterated its earlier position. Parker noted the interim agreement of the parties with respect to fees for the 1985-86 academic year. Parker also stated that the university’s proposals were not yet prepared, nor would they be delivered before September, given vacation schedules. The Board notes that the union president, I. McLellan, was invited to serve as union representative on the implementation committee; the invitation was accepted without prejudice to the union’s position on the negotiability of the nine point programme.

23. The instant complaint was filed on July 5, 1985, as noted. The university then took a position, best expressed in a letter from Parker dated August 12:

Given the nature of the unfair labour practice complaint brought by your client, the nature of the collective bargaining process, involving as it inevitably does compromises and tradeoffs between the parties on positions sought to be achieved, and the obvious importance to your client of the 9 proposals in respect of divestment, it is our position that no further negotiations should take place until the Board has rendered its decision and we can be guided accordingly.

The union asserted that negotiations should continue regarding all terms and conditions of employment not directly related to divestment. The complaint was formally amended to include the allegation that the university’s refusal to bargain pending the outcome of Board proceedings also constituted a violation of section 15 of the Act.



## II

24. Although the evidence put before the Board was by agreement of the parties, two days were devoted to argument. The submissions of both counsel were able and thorough. Both carefully reviewed the evidence and the caselaw in support of their respective positions. As both counsel, almost without exception, referred to the same jurisprudence in support of their respective positions, it is convenient to here set out those cases: *Canadian Industries Limited*, [1976] OLRB Rep. May 199, 76 CLLC 16,014; *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49, 76 CLLC 16,009; *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411, 83 CLLC 16,066; *Pulp and Paper Industrial Relations Bureau*, [1978] Can. LRBR 60; *Four B Manufacturing Limited*, [1978] OLRB Rep. Aug. 741; *Cable Tech Wire Company Limited*, [1978] OLRB Rep. Oct. 895; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397; *United Brotherhood of Carpenters & Joiners of America*, [1978] OLRB Rep. Aug. 776. Counsel for the applicant also placed before the Board the following article, *B. A. Langille* "Equal Partnership in Canadian Labour Law", (1983) 21 *OHLJ* 496. In a very abbreviated form, then, arguments of the parties were as follows.

25. Counsel for the complainant asserted that there were no limitations on the scope of bargaining, other than subjects "illegal" by virtue of the Act (e.g., recognition, scope of bargaining unit) and, perhaps, items "totally lacking" in merit or relevance. Counsel submitted the Act imposed no restriction on the scope of bargaining (other than the restrictions already noted), and, indeed, the definition of a collective agreement in section 1(1)(e) was expansive. That is, a collective agreement contained provisions relating to terms and conditions of employment *and* rights, privileges and duties of an employer, union and employees. It was contended any distinction between "decision" bargaining and "impact" bargaining was inappropriate. Counsel referred to the alleged distinction between bargaining about "location" (which was acknowledged by Parker to be "negotiable") and the specific location of McMaster Hall (which the university regarded as non-negotiable) to illustrate his position that any attempted distinction was unworkable and irrelevant. Thus, counsel submitted that the respondent was required to bargain about the 9 point programme by virtue of section 15 of the Act and the respondent's refusal violated that obligation, including the duty subsumed in that section to recognize the union as the bargaining agent for the employees in the bargaining unit. In the alternative, if the scope of bargaining was limited to matters with a direct or indirect impact on the terms and conditions of employment, counsel argued that the items in the 9 point programme still fell within the proper scope of bargaining. (The Board has not summarized counsel's review of each of the 9 points in support of this assertion).

With respect to the allegation that the refusal of the requested information violated section 15 of the Act, counsel submitted that the information requested must only be reasonably related to issues at the bargaining table. In the instant facts, it was argued the information was reasonably related to separation and, thus, must be disclosed. Counsel stated that there were appropriate mechanisms for dealing with any question as to the confidentiality of information so requested. Moreover, counsel asserted requesting information about a "sale" of a business (i.e., "separation" in this case) was not different from situations where an employer has raised

financial circumstances in negotiations and where disclosure of such information has been required.

With regard to the respondent's refusal to bargain pending the outcome of the bad faith bargaining complaint, counsel argued that there is an obligation under section 15 to continue negotiations notwithstanding the filing of a complaint. In addition, counsel contended the university had indicated bargaining would continue. As well, it was submitted that the respondent had engaged in a pattern of delay, in effect, to take advantage of the July 1, 1986 deadline for separation. In this context, then, to permit the respondent to halt negotiations on items clearly acknowledged as related to terms and conditions of employment would place the complainant in a worse position for filing its bad faith bargaining complaint.

In conclusion, counsel asserted that the respondent had contravened the duty imposed by section 15 of the Act by refusing to negotiate with respect to the 9 point programme, by refusing to disclose the requested information, by engaging in a pattern of delay and by refusing to continue negotiations pending the outcome of the bad faith bargaining complaint.

26. Counsel for the respondent argued that, while the definition of a collective agreement was expansive, a union only had authority under the Act to bargain as agent for the employees in the bargaining unit. An employer could not refuse to recognize or seek to undermine a union as the sole bargaining agent for employees in the bargaining unit but need not deal with the union seeking to act on behalf of other groups or institutions and would not violate section 15 of the Act in refusing to do so. In the instant facts, it was asserted that the union had identified itself as the sole body entitled to speak on behalf of the Conservatory as an institution. Counsel contended the respondent was not required to deal with the union in that context. Thus, it was argued that, as the 9 point programme related to the Conservatory as an institution and was outside the employment relationship, the respondent was not obliged to bargain about those items. Counsel referred to the "sale" of a business as an illustration. That is, it was argued an employer need only bargain about the "impact" of a sale and not about the "decision" to sell, unless the sole cause of the sale decision related to employment conditions (e.g., wage costs, etc.). Moreover, counsel submitted there was no evidence as yet that there would be any impact on employment conditions as a result of divestment. Even assuming an impact, though, it was asserted the respondent need only bargain about that impact and not about the decision itself.

With respect to the information request, counsel first argued that the information related to the 9 point programme need not be disclosed as the 9 point programme itself need not be bargained. Even if the 9 point programme was negotiable, the information requested was too broad and not shown to be clearly relevant to the 9 point programme. In fact, it was contended that the request related to an alleged union intention to generate debate on the quality of management by the Governing Council and the use of funds rather than to matters relating to the employment relationship. Counsel submitted the combination of the complainant's positions that all matters were negotiable and all information reasonably related to proposals tabled must be disclosed meant that, in effect, everything was subject to disclosure. That the Board should supervise information requests and attach conditions to disclosure where the material was sensitive was characterized as unworkable.

Again, in the alternative, if the 9 point programme was negotiable, counsel submitted a violation of section 15 required either employer conduct amounting to a refusal to recognize

the union as sole bargaining agent *or* conduct which suggested less than a full commitment to concluding a collective agreement. Here, it was argued the evidence did not support a finding that the respondent was not committed to a collective agreement or had failed to recognize the union as sole bargaining agent for employees in the bargaining unit. Rather, the refusal related only to the respondent's belief that the 9 point programme was not negotiable. In fact, counsel contended that, provided an employer intended to negotiate a collective agreement and particularly where (as here) the issue was unusual or peripheral to the employment relationship, the employer could refuse to negotiate that issue without contravening the duty imposed by section 15 of the Act.

With respect to the alleged delay, counsel submitted that the evidence did not disclose undue delay given the complexity of divestment and the agreement of the parties that the period from January to April 1985 should not be regarded as culpable delay by either party.

With regard to the refusal to bargain pending the outcome of the bad faith bargaining complaint, counsel asserted that, as the complainant regarded the 9 point programme as of greatest importance, as the 9 point programme and the "other" issues involved economic costs and as the respondent did not know whether it would be compelled to bargain about the 9 point programme, continued negotiations were unworkable. That is, in the circumstances, the respondent was justified in refusing to bargain until the complaint was resolved.

In summary, counsel argued there was no failure to recognize the union as sole bargaining agent for employees in the bargaining unit with respect to the employment relationship (as opposed to agent for the Conservatory as an institution) and no refusal to enter into a collective agreement. Hence, counsel submitted there was no contravention of the duty to bargain in good faith.

27. In reply, counsel for the complainant opposed any distinction between "decision" bargaining and "impact" bargaining as irrelevant to the duty imposed by section 15 of the Act. Further, counsel opposed differentiating between the union bargaining on behalf of employees in the bargaining unit and "acting on behalf" of the Conservatory as an institution, where there is an impact on the employment relationship. Counsel characterized this as an attempt to introduce a "mandatory-directory" approach to the duty to bargain, asserting that that approach had been rejected in Canadian labour relations. Counsel submitted, in any event, that the union need not wait until the impact of separation was known before seeking to bargain about the consequences of divestment, particularly since the union could not require such negotiations during the term of a collective agreement. It was argued the information requested was needed for full and frank discussions and the Board could deal with spurious requests for disclosure. Finally, counsel submitted the duty to bargain in good faith did not just require recognition of the union as sole bargaining agent and an intention to conclude a collective agreement but also obliged the parties to engage in full and rational discussions. That is, a party must state and explain its position on items tabled (as opposed to necessarily changing its position). Here, counsel asserted the respondent had not fulfilled this aspect of the duty imposed by section 15 of the Act.



### III

28. Section 15 of the *Labour Relations Act* reads:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

29. The Board intends to deal with each of the four issues separately, namely, the scope of the duty to bargain, the duty to disclose information, delay, the refusal to negotiate pending the outcome of the instant complaint.

#### Scope of the Duty to Bargain

30. The scope of the duty to bargain imposed under section 15 of the Act is squarely raised on the instant facts and has not been dealt with quite so directly by the Board previously. It is useful to refer first to the classic exposition of the duty in *De Vilbiss (Canada) Limited*, *supra*, at paragraph 13:

The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective—that of entering into a collective agreement and [then] section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

31. Given that “voluntarism” is the touchstone, it is implicit that the Board’s role pursuant to section 15 of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled. This role stands in sharp contrast with the American approach embodied in the “mandatory-directory” classification of proposals and the different consequences for bargaining of classification as a “mandatory” or “directory” item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme: see *Consolidated Bathurst*, *supra*; *Pulp and Paper Industries*, *supra*; *Westinghouse Canada Limited*, *supra*.

32. This does not mean that the Board is totally distanced from the *content* of the parties’ proposals or that there are no limits whatsoever on the scope of bargaining. The Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or

whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer “tailor-made for rejection”: see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Ltd.*, *supra*; *Irwin Toy Ltd.*, [1983] OLRB Rep. July 1064. Further, the Board may review the content of proposals to assess whether any items are “illegal”. For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme: see *United Brotherhood of Carpenters & Joiners of America*, *supra*; *Toronto Star Newspapers Ltd.*, [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811. See also: *Croven Limited*, [1977] OLRB Rep. Mar. 162; *A.N. Shaw Restorations Ltd.*, [1976] OLRB Rep. Sept. 504; *T. Barlisen & Sons*, [1960] OLRB Rep. May 80; *Canada Cement LaFarge Ltd.*, [1980] OLRB Rep. Nov. 1583; *Treco Machine Tool Ltd.*, [1982] OLRB Rep. Dec. 1954. The Board notes that, although two examples of demands which have been found to be “illegal” are mentioned and other examples are contained in the cases referred to, the appropriate scope of the concept of “illegality” is not before the Board in this case.

33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to *agree* that any matter may become part of their collective agreement, it is implicit that each party must be free to *table* that matter for discussion. While this is perhaps the bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse*, *supra*; *Sunnycrest Nursing Homes*, *supra*; *Consolidated Bathurst*, *supra*; *Canadian Industries Limited*, *supra*. In the instant case, then, the respondent may not refuse to discuss the “9 point programme”. The respondent characterized the 9 point programme as intruding on areas reserved to management. Quite simply, the parties are bargaining about what is reserved to management; the 9 points are not subjects *a priori* “off-limits” for discussion. The definition of a collective agreement in section 1(1)(e) of the Act is expansive; apart from illegal matters, the Board should not seek to restrict the scope of clauses which may be incorporated by agreement of the parties in *their* collective agreement. For the Board to accept the respondent’s arguments would inevitably draw the Board into the mandatory-directory analysis of the duty to bargain. This, the Board will not do. Nor does the Board accept the respondent’s asserted distinction between the union acting on behalf of the employees in the bargaining unit and acting on behalf of the Conservatory as an “institution” as relevant to the duty imposed by section 15 of the Act. The union is the exclusive bargaining agent for employees in the bargaining unit - no more and no less. But as exclusive bargaining agent, the union is entitled to present its proposals for a collective agreement. The union may be seeking to occupy the “high ground” in an attempt to broaden its support or to introduce novel clauses in a collective agreement or be acting from other motives. Provided the motive is not the avoidance of a collective agreement, the Board will not question the wisdom of the priorities established or proposals formulated by the parties.

34. The Board, then, finds that the respondent’s refusal to discuss the 9 point programme constitutes a violation of the duty to bargain in good faith. It is important, though, to clarify the obligation imposed on the respondent by virtue of section 15 of the Act. The statutory scheme establishes a structure for bargaining, a framework to facilitate full and frank discussion against a backdrop of the right to resort to economic sanctions. Thus, the respondent must *discuss* the proposals tabled by the union, including the 9 point programme. This does not mean the university must *agree* to those proposals in the current form or at all. The university, however, must respond to those proposals by stating its position with its explanation of that position. It may well be that rational communication between the parties will enable an accommodation to be reached without recourse to economic sanctions. Or, resolution of the

matters in dispute may require exercise of such sanctions. That is for the parties to determine. The Board's role, apart from the *caveats* already noted in paragraph 32, is to monitor the process of bargaining to ensure that both parties intend to conclude a collective agreement and are making every reasonable effort to do so.

### Duty to Disclose

35. The information requested by the union is as follows:

- (a) all documents concerning the future use of McMaster Hall (the main location of the Conservatory) including estimates for renovations, plans for future use for both the building and the land, correspondence and documents regarding the land and building, correspondence, offers from interested purchasers, etc;
- (b) any plans to sell or dispose of any of the branches of the Conservatory or of any other assets prior to separation;
- (c) all assets of the Conservatory at the time it joined the University, including evaluation and allocation of those assets, and all documents concerning the sale of the College Street building to Hydro, and full disclosure of the consideration for that sale;
- (d) a list of all current assets of the Conservatory at the present time, including pianos, instruments, etc.;
- (e) all documentation in connection with the current examination system;
- (f) a list of all trust funds, endowment funds, bursaries and scholarships used for students at the Conservatory, including books, materials and musical documents left or willed to the Conservatory over the years by teachers;
- (g) all documentation concerning the Frederick Harris Music Company, including its financial statements for the past five years;
- (h) all financial information concerning the present position of the Conservatory, including its current budget, income and expenditure figures;
- (i) all documentation and correspondence between the University and the Provincial Government regarding the future of the Conservatory, and what, if any, financial commitments have been made or sought from the Provincial Government concerning the Conservatory;
- (j) all planning documents and memoranda concerning the future of the Conservatory, including all documents regarding the future decision-making process, including the timetable of that process.



36. Counsel for the complainant asserted that the duty to bargain in good faith included a duty to disclose, on request, information reasonably related to the proposals at the bargaining table. It is true that some statements in the jurisprudence appear to support the union's assertion. For example, in *Consolidated Bathurst, supra*, (at paragraph 43) the Board stated:

A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities.

However, the Board considers that that statement must not be wrenched from its context to form the basis of a broad duty of disclosure. One starts with one function of the duty to bargain in good faith, as enunciated in *DeVilbiss, supra*, namely, "to foster rational, informed discussion thereby minimizing the potential for 'unnecessary' industrial conflict." (at paragraph 15). The obligation to disclose which developed to further that "informed" discussion has two aspects. One, which is not of concern here, is the "unsolicited disclosure" branch. That is, in certain circumstances, the Board has imposed a positive duty to reveal information, such as, decisions to relocate, contract out, etc.: see *Consolidated Bathurst, supra*; *Westinghouse Canada Ltd., supra*; *Inglis Ltd.*, [1977] OLRB Rep. Mar. 128; *Sunnycrest Nursing Homes, supra*. The other branch concerns the "request" for information. As stated in *Consolidated Bathurst, supra* (also at paragraph 43):

Although the Canadian experience is limited, the American cases reveal that the employer is under no duty, as a general matter, to provide information until the union makes the specific request for the relevant information.... A request identifies the union's interest in specific information and thus permits a discussion by the parties on the relevance of the data. The requirement of a request also sharpens a disclosure obligation.

37. The cases in which the Board has upheld a duty to disclose, however, have dealt with information with respect to *existing* terms and conditions of employment, (such as, wages, benefit costs, classification structures). It is not difficult to understand that the absence of access to that sort of information, particularly in first contract negotiations, would entirely emasculate the duty to bargain in good faith: see *Radio Shack, supra*; *Globe Spring and Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, 83 CLLC 16,055; *Windsor Star*, [1983] OLRB Rep. Dec. 2147; *DeVilbiss, supra*. The full and rational discussion aspect of the duty to bargain also may result in the imposition on one party of a duty to disclose information where that information is needed to adequately comprehend a proposal or response of that same party. (Although not precisely on point, see *Canadian Industries, supra*; *St. Joseph's Hospital*, 76 CLLC 16,207). What the case law does not support is the use of the virtually unlimited scope of bargaining to enable one party to use its *own* proposals as a springboard to a duty imposed on the *other* party to disclose information related to those proposals. Nor is the Board prepared to hold that the duty to disclose is co-extensive with the scope of the duty to bargain so that any request for information reasonably related to any proposal by the party initiating that proposal must be fulfilled. Information disclosure is one step removed from bargaining proposals. The Board's approach represents a balancing of *voluntarism* at the bargaining table (i.e., allowing a broad scope to parties wishing to address specific issues in a collective agreement) and of the *compulsion* to disclose information imposed on one party in negotiations. Apart from existing terms and conditions of employment (wages, benefits, classification structures, etc.), where a union has a *prima facie* right to information, the disclosure obligation is contingent upon the information being necessary for one party to adequately comprehend the position taken by the other. In other words, if one party maintains a position (whether in the form of a proposal or response) which is grounded on a rational

explanation, that party may be subject to a duty to disclose information to demonstrate the *bona fides* of that rational bargaining position.

38. At present, then, the Board does not find that the university's refusal to disclose the information requested contravenes the duty imposed by section 15 of the Act. Once the university has complied with the directions of the Board in respect of the other violations of the duty to bargain, it may be that some of the information requests, as listed in paragraph 37, then fall within the categories to which the Board has stated an obligation to disclose attaches depending upon the university's response. The union would be free to raise the matter at that time.

### Delay

39. The Board does not consider the delay prior to the filing of the instant complaint as constituting a violation of the duty to bargain in good faith. The parties agreed that the delay between January and April 1985, was not to be regarded as culpable. It may well be that the respondent is seeking some tactical advantage in proceeding less than expeditiously given the July 1, 1986 deadline for separation. However, it would be naive to think that negotiations do not involve both parties giving extensive consideration to the timing of proposals, counter-proposals etc. Nor is one party at the mercy of the other with respect to the pace of negotiations. In this instance, for example, the union could decide to hasten the progress through the statutory process leading to the point where economic sanctions are permitted. Delay in negotiations has been found in some circumstances to establish an anti-union motive (e.g. *Fotomat Canada Limited, supra*). In this case, however, the circumstances are not comparable and, hence, the Board does not find a contravention of section 15 on this aspect.

### Refusal to Continue Negotiations once Complaint Filed

40. As noted in paragraph 23 above, the university refused to continue negotiations pending the outcome of the bad faith bargaining complaint. The respondent asserted the refusal was warranted as continued negotiations were unworkable given that the 9 point programme involved economic costs, that programme was regarded by the union as of utmost importance and it was not known whether the respondent would be compelled to bargain about that issue. In the Board's view, none of these factors justify a refusal to continue negotiations pending the resolution of the complaint. It was acknowledged that the union had tabled various other proposals which dealt with "terms and conditions of employment", read narrowly. There is no cogent reason precluding bargaining about those items. If either party wishes to preserve its flexibility pending the outcome of the Board proceedings, there are mechanisms, which the Board need not outline, for doing so.

41. Further, there are sound labour relations reasons for requiring parties to continue bargaining notwithstanding the filing of a complaint. As stated, the legislation establishes a structure to conduct full and frank discussions between the parties to resolve the matters in dispute between them and conclude a collective agreement. The parties have recourse through the filing of an unfair labour practice complaint to enforce that statutory obligation. To allow a party against whom allegations of bad faith bargaining have been raised to cease negotiations

pending the disposition of the complaint rewards that party for violating the Act or, at the very least, interrupts the process of negotiations. Once interrupted, it is more difficult to restart bargaining and time is lost. Indeed, requiring the parties to continue negotiations may well enhance the likelihood of settlement of the original complaint. While it is theoretically conceivable that there might be circumstances where a refusal to continue negotiations might not violate the duty imposed by section 15, that is not the case here. The considerations which prompted the Board's refusal to grant a stay in Board proceedings pending determination of an application of judicial review are also applicable here: *Four B Manufacturing, supra*; *Cable Tech Wire, supra*.

42. Thus, for the policy reasons referred to, the Board finds that the respondent contravened the duty to bargain in good faith by refusing to continue negotiations pending the resolution of the complaint. The Board stresses that this obligation to continue negotiations does not depend upon the alleged agreement by Parker to continue bargaining notwithstanding the filing of a complaint but flows from the duty to bargain itself. To hold otherwise would result in the suspension of the duty to bargain wherever a complaint alleging breach of that very duty is filed. Such a consequence is not to be commended.

43. The union has also alleged contravention of section 64 of the Act. Given the findings with respect to violations of section 15, it is not necessary to consider further this aspect. Indeed, this allegation was not dealt with separately from the representations concerning the duty to bargain, and in the Board's view, is subsumed in the alleged violation of section 15 of the Act.

### Remedy

44. The complainant requested the following relief: an order directing the respondent to bargain in good faith with respect to all of the union's proposals; that the Board establish a time frame for bargaining, including the tabling of the respondent's proposals; that the Board remain seized with respect to the process of bargaining so that a party could return to this panel with fresh complaints; disclosure of the information requested; a posting with a direction that copies be mailed directly to all employees. Counsel for the union stressed that this relief was necessary to prevent the duty to bargain being rendered impotent through the passage of time. Counsel for the respondent asserted that relief beyond the usual declaration and direction to resume bargaining was inappropriate.

45. As noted in *Canadian Industries, supra*, the focus of the remedial authority vested in the Board in these cases should be on repairing the bargaining relationship. The Board has found violations of the duty to bargain in the respondent's refusal to discuss the union's proposals with respect to the 9 point programme and refusal to continue negotiations pending resolution of the instant complaint. Some of the relief requested relates to allegations where the Board has not found a contravention of the Act. Further, the Board does not consider it appropriate to establish a rigid timetable for negotiations or to remain seized for the purpose of hearing fresh complaints related to the further conduct of negotiations. Rather, the Board is satisfied that the appropriate relief consists of a declaration that the respondent has contravened section 15 of the Act, as noted, and a direction to the respondent to begin to bargain in good faith and make all reasonable efforts to conclude a collective agreement. To this end, the Board also directs that the respondent table, within a reasonable period of time



following the release of this decision, a full package of proposals on all issues, including a response to the union's 9 point programme. Any non-compliance with these directions may be pursued in the usual way. Finally, the Board notes that the university has dealt with the faculty association for some time, albeit prior to certification. The Board considers that both parties can adjust to the new status of the association as certified bargaining agent for the employees in the bargaining unit, within the context of the Board's findings and orders herein and, by engaging in full and frank dialogue, conclude a collective agreement.

#### **DECISION OF BOARD MEMBER R.J. GALLIVAN;**

1. Of the four matters raised by this complaint, the key issue for determination by the Board is that related to the scope of the duty to bargain. On the majority's decision on that issue and its related decision dealing with bargaining following filing of the complaint with the Board, I disagree.

2. Through the cooperation of the parties there was agreement on the multitude of key facts covering complex developments involving the University and Conservatory spanning a period of several years and involving numerous streams of events moving sometimes in parallel and sometimes on divergent courses. Among the agreed facts in evidence the Board had available to it very detailed minutes of every one of the negotiating meetings which took place between the parties from the date of the Union's certification in October 1984 to the date it filed this complaint in July 1985. In fact, two sets of minutes were submitted in evidence for each meeting: those kept by the University and those kept by the Union. As indicated by the majority, those two sets of minutes were substantially similar to each other and were referred to interchangeably by the parties in the proceedings before this Board. We can thus take it that they represent an accurate account of the bargaining meetings between the University and the Union.

3. The University has been found guilty by the majority of refusing even to discuss the 9 point programme. Yet the minutes of the negotiating meetings prove the very opposite. The 9 point programme was given wide publicity by the Union over the heads of the University's bargainers before being tabled as formal bargaining demands at the April 17th negotiating meeting. According to the minutes of that meeting, as might be expected, the dialogue consisted mainly of an explanation by the Union of the 9 points and questions raised by the University for clarification of them and of the Union's position. However, the next bargaining meeting, that of May 22nd, was devoted almost exclusively to a full and far-ranging discussion of the 9 points. Here in part is what the minutes of that meeting say:

... Parker said that he was prepared to comment upon the nine proposals presented by Mitchell at the last meeting. His comments are as follows:

1. Parker said it was obvious to all at the table that the institution will continue to be called The Royal Conservatory of Music as long as the University of Toronto is involved. Afterwards it would depend on the Board of Directors or whatever group is formed.

2. McMaster Hall. He said Governing Council will consider this issue as will the University administration and it would not be appropriate to comment on this. Mitchell asked whether Parker was saying this was not negotiable. Parker made reference to President Ham's letter dated June 13, 1983 giving the University's position with respect to McMaster Hall. He showed Mitchell the letter and confirmed that Mitchell had a copy of the report. Mitchell asked

whether this letter represented current policy. Parker said that it represents the University's position transmitted earlier. He noted that the letter said that the Conservatory would not be forced out of McMaster Hall without consultation. The letter expressed sensitivity and concern with respect to the location for students and teachers. Mitchell said he took it then that this was negotiable. Parker said he was not saying that. Mitchell asked if it was a matter for bargaining. Parker said that he could see that *location* might be a matter of concern for staff and that it could possibly be considered an employment condition if, for example, there were a move to Pape and Danforth he could see this as a possible issue. However, he said he did not see it as a specific matter regarding the specific property of McMaster Hall. He said the letter reflects all of this. Mitchell said that given that Governing Council passed the motion and that Parker was discussing it, he took it that the current plan was to proceed toward separation in July 1986. Parker said he had no information that would lead him to believe otherwise. Mitchell said then if that is the case, what is the present intention re the present location of the RCM as of 1986. Parker commented that Mitchell had a copy of the resolution not put to Governing Council but presumably it would be at some point. It says that McMaster Hall or other equivalent facilities. Parker said he knew of no plans to immediately move from McMaster Hall and added that furthermore Ham's letter spoke to this issue. Mitchell queried access arrangements. Parker referred to the uncertainty of any new governing body of the RCM but said that he knew of no university plans with respect to McMaster Hall.

3. & 4. Parker said that these two were answered in the resolution of Governing Council. He referred to the text of the proposal with respect to equipment and said the resolution answers the questions raised. Mitchell noted that #3 was explicitly covered and asked whether Parker was saying that those items in #4 were also covered by the motion. Parker said yes, these were an integral part of the employment relationship. Mitchell referred to ambiguity related to instruments in the main building as the resolution refers to branches. Mitchell asked specifically whether McMaster instruments in McMaster Hall such as pianos and also the bookstore would be covered. Parker said that he would get back to the Association on those two questions.

5. Parker said the University position is not finalized and won't be until divestment is resolved but that he had no reason to think other than that the exam system would go to the RCM, but that he was not able to be more specific at this time. Mitchell noted that one report indicated that the exam system would remain with the University and not the RCM and that this had resulted in a heated controversy. In the last report the University position had changed and it had been decided that the examination system would remain with the Conservatory. Parker said he would get clarification on this item. Mitchell noted that this question was not any detail but a major item as the union represents examiners. Parker acknowledged this and said that he would respond at a later date.

6. & 7. Parker said that these were both covered in the proposed resolutions. Mitchell asked whether the University had documents for them with respect to Frederick Harris. Parker said he did not and it was not the intent to provide these as the University did not accede to the union's request. Mitchell asked why not. Parker said it was not a matter they were prepared to negotiate with the Faculty Association. Mitchell asked whether there was a reason for not disclosing. Parker said he supposed it was not considered a part of the business of negotiating a collective agreement.

8. Parker reported that he had hoped to give Mitchell information on this and had planned to convey details and discuss it. However, Roger Wolff had contracted [sic] pneumonia and had not been available. He said that immediately upon confirmation of the plans he will communicate to Mitchell. Mitchell asked when this might be. Parker said he was loathe to commit not knowing the state of health of Wolff but estimated a week. Mitchell asked what this material would cover. Parker said the mechanism for proceeding with divestment. Mitchell asked whether the University intended to proceed with legislation. Parker said that this would obviously be necessary in order to divest. Mitchell commented the Legislature would set up a new body statutorily. Parker said there would have to be a whole mechanism for developing a format and to formulate a plan. There would be a need for a detailed plan and there would be public exposure. Mitchell commented there would be the need to negotiate a plan but with

whom. Parker said the University is responsible for the Conservatory and in order to divest it must set up a new form of administration. Mitchell said there would not be a new Board until there was legislation and that he was confused about how this was going to work. Mitchell commented with respect to Frederick Harris that Parker was saying that he would not negotiate with the union but with the new body. Parker said that he had not said it would be negotiated but that it would be dealt with. Mitchell said the conclusion is the University will do it by itself. Parker said the University thinks it has the right. He said at the table we were negotiating a collective agreement dealing with working conditions. Mitchell said that it directly affected their position if there was a unilateral transfer of the music company with a negative impact. Therefore it must be negotiated. Parker said that we were here to negotiate matters related to a collective agreement. He said that McMaster Hall had been raised as it had to do with security of employment, student relationships and relationships of the faculty of music and he understood their concern on this matter. However, he did not think the same concerns were expressed with respect to transfer of assets. Mitchell asked that the position be reconsidered. He said that the union's position was that the University intended to unilaterally sell the Conservatory with not an asset but a financial burden and that the faculty are the ones that will suffer. He said that he could answer that concern if it could be demonstrated through the disclosed information that it may not be a problem. Parker said it was a question of to whom it was disclosed and when, for example to the new governing body of the Conservatory. Mitchell said that that was circular and that it meant that the University was going to do it in its own way. Mitchell said that he did not accept that the University did not want to discuss the matter here and that he did not want to make an issue of it, and perhaps it was academic as it will at some time be public. He asked that the University tell the Association the story and get them onside as this creates suspicion. Parker said that at an appropriate time the University will need to report on all these matters and noted that it could not amend legislation without a full examination of these issues. Mitchell asked that Parker relay to his principals two concerns: 1) express the union's view on what is negotiable and 2) if it is not a problem, there should be disclosure and therefore an issue would not be created. Parker said that these matters will be disclosed, however it was a matter of going through the Governing Council structure. Mitchell said he was not satisfied by the refusal to disclose (there was a little bit of discussion here that I did not catch). Parker said that matters of assets were not negotiable. He said the University has considered it and responded on those matters raised with respect to employment and working conditions and that more information will be transmitted at the appropriate times. Mitchell said the appropriate time is not now? Parker said we are not negotiating divestment but a collective labour agreement and that he had yet to see proposals with respect to a collective agreement. Mitchell said that he understood that Parker did not have any proposals. Parker said that he did not certify. Mitchell said that he was not prepared to wait while the University developed their proposals.

9. Parker said that this related to divestment and was not negotiable. Mitchell asked how this was seen as being funded. Parker said that this will need to be determined. Mitchell said and not negotiated with us. Parker said it is a matter for the Administration and Governing Council to work out and will go to Governing Council. Mitchell asked if there will be a process of discussion and consultation or whether everything would be done behind closed doors and in the fullness of time. Parker gave a general outline describing in general an Implementation Committee [sic] and the Governing Council committees. I did not copy the details of this. Parker said he was trying to describe the process which was a difficult one. He said that some things were not available in the process of collective bargaining at this time and he was not trying to be awkward. Mitchell said that what was being said was that these items were not going to be negotiated, so what was the process of decision-making and what was the involvement of the University community and faculty going to be. He said he needed to know this. Parker said the matter was before the Governing Council and was not private. He said that the Faculty Association has communicated with Governing Council and the Chairman has communicated with the Association and that he was not at liberty to negotiate divestment. Mitchell said that he was hearing that Governing Council was going to decide matter. The Administration would recommend to Governing Council and its committees and that the Faculty Association could approach these. Parker said representations are allowed and encouraged. Mitchell asked prior to that if there would be any consultation. Parker said that is part of question #9 regarding implementation. He said that Mitchell also knew that Governing Council had heard



representations from staff on issues and said that we would make the Association aware of developments. Mitchell asked whether the Administration would discuss before recommending. Parker said he could not answer that. Mitchell asked if there would be discussions with the Faculty Association. Parker said he could not answer, however he could say there would be an Implementation Committee and meetings held with respect to that. Mitchell asked when. Parker said he could not specifically tell Mitchell it was unfortunate that Roger Wolff was ill. He had hoped to have a better understanding of the earlier *process*. He said that he took it that the Association wanted to be informed of times, dates, meetings, etc. Mitchell said yes and he said they intended to negotiate at this table whether it was thought appropriate or not. Parker restated that divestment was a matter for the University. Mitchell again asked for documents....

4. Such extensive dialogue hardly denotes a refusal to discuss the 9 point programme. On the contrary it shows that the 9 points were extensively discussed; it also shows quite clearly that the University simply was unwilling to concede to the Union's demands - which even the majority agrees it has a legal right to do. Note too that the University's spokesman Parker several times during the discussion identified where the issues raised could involve matters relating to security of and other conditions of employment, thus making it clear to the Union that in those aspects the University was prepared to come to some accommodation. Note too the several occasions where Parker agreed to obtain for the Union the answers to detailed questions raised in the discussion, answers which were not readily available at the time. The minutes of the next following meeting record Parker's answers to all of the Union's questions except those on which the University itself still had not worked out the details or on which the University was unwilling to supply the information requested.

5. Again, such wide-ranging dialogue and willingness to come back later with further information for the Union, is clear evidence of the fact that the University did discuss with the Union its 9 points - contrary to the assertion by the majority that the University refused such discussion. Not only did the University discuss those demands, it made a counter-proposal to include the Union's president on the Implementation Committee being established by the University to oversee the separation of the Conservatory from the University - a subtle end-run offer the Union accepted without prejudice. Thus there was a demand from the Union followed by a counter-offer from the employer - not an offer the Union liked but an offer nonetheless. It is difficult to understand how an objective observer could characterize such conduct as a refusal to bargain; proposal and counter-proposal are the essence of bargaining.

6. The flaw in the majority's position becomes even clearer if one considers the practical effect of its ordered remedy to the alleged violation - a direction to the University to bargain in good faith. Despite the innovativeness of most collective bargainers there are only so many ways an employer can say "no" to a union demand. In this case the University has made it very clear that its answer to the Union's demand for a veto over the divestment decision (the Union "... will support the separation of the two institutions if, and only if, the following conditions are met...") is "no". It has offered to keep the Union involved in the ongoing process, to communicate regularly with it and to seek its views, but it has refused to concede the management prerogatives demanded by the Union. Other bargainers might have used different words than were used here to convey the message, but the message was clear. Even silence can send a loud signal between experienced bargainers.

7. What more can the University say about the Union's 9 points than it has already said? Should it just go through the motions of more talk? Engage in "surface bargaining"? Prolong the discussion and risk misleading the Union into believing that it might yet win its

demand if only it can get the University with the help of this Board to talk long enough? In this case both the Union's and the University's bargainers are experienced labor relations practitioners. They don't have to paint elaborate word pictures for each other in order to get their positions across. Their experience is such that they needn't engage in theoretical or academic exercises. Yet that is what the majority's decision will force them into. Instead of being a help to the parties to bring them closer to a collective agreement, this Board's decision will at best delay the real bargaining that will take place after the Union's 9 points are disposed of, and at worst may well prevent any peacefully arrived at agreement at all. Either result is a high price to make the parties pay for the sake of symmetry with Board precedents none of which, as argued by the Union itself and admitted by the majority, apply to the unique facts of this case: "The scope of the duty to bargain... has not been dealt with quite so directly by the Board previously" (para. 30). It is thus unfortunate that the Board, when presented with an opportunity to be pragmatic and helpful, chooses instead to take an academic and theoretical approach to the key issue raised before it.

8. I agree with the majority that the parties are free to include in their collective agreement whatever suits them, and therefore that each is free to table any matter for discussion. Where I disagree with the majority is in its conclusion that no matter how ludicrous a demand might be, or how far removed from terms and conditions of employment, it must be dignified by negotiations and lengthy discussion. Then, if the author of the demand isn't satisfied by the outcome of the discussion this Board will determine whether or not it was adequate! That role for the Board is inevitable given its reluctance to decide that certain demands are beyond the pale of good faith bargaining. So it concentrates upon the process rather than the content of bargaining and concludes that the latter must mean that everything is bargainable. If the Conservatory was seen in the industrial setting as being simply one branch plant of a multi-location enterprise which the employer had decided to divest, the Union's 9 point programme would amount to a demand for a veto over the sale. While the University could, if it wished, concede such a power to the Union it is under no legal obligation to do so. Once the University has said "no" to the demand, the Union has no legal right to enforce it (although it is free to attempt to do so by strike action). The Union's certification as bargaining agent for the employees does not give it ownership rights in the employer's property.

9. The issue for this Board then becomes one of determining whether or not the University's bargaining "process" in refusing the demand has been adequate to meet some unspecified criterion of the majority. On such a clear cut issue as whether or not the University should abdicate its management rights and concede a veto power to the Union over the divestment, how much more discussion is required?

10. If, as the majority claims, the demand is simply about the management rights clause eventually to be included in the collective agreement, the University has made its position clear - it is not going to bargain away its lawful, traditional and innate rights to manage. Instead, it has made a counter-proposal, short of what the Union wants - but it is not up to this Board to judge it in the absence of any claim that the University's position is designed to be destructive of the Union or to thwart achievement of a collective agreement. None of the evidence before this Board could support such a charge.

11. If the University had demanded a change in the Union's dues structure "without which there will be no agreement," or had demanded that the Union change its political

affiliation or law firm, or that the University be granted the power to veto a Union decision to join the Ontario Federation of Labor or the C.L.C., how much time does one imagine the Union's bargainers would take in saying "no"? The Union's answer I expect would be curt and to the point, that it was not going to bargain about its internal affairs, and that would be the end of it. Except if the University were then to charge the Union before this Board with refusing to bargain those demands. Would this Board then order the Union to return to the bargaining table and, in good faith, bargain about such demands? For consistency with its decision here, the answer would have to be "yes", although clearly the correct answer should be "no".

12. The ethereal and impractical view of collective bargaining taken by the Majority in this case is further illustrated by its decision that the University also erred in bringing bargaining to a halt until the Union's complaint on the 9 points had been settled by this Board. An experienced bargainer would not, nor should he be expected to, make a substantive offer of settlement until he is sure he knows the parameters of the Union's position. That is why a typical offer is usually a "package offer" or "global response" designed to narrow the issues in dispute and form the basis of settlement. The offer has the effect of putting the employer's cards on the table, or at least of tipping his hand. No experienced bargainer does that until he is reasonably certain the other side has delineated its position. To expect the University to continue meaningful bargaining without knowing the parameters of the accommodations it might have to make on the 9 points is to force it into an unrealistic and untenable bargaining process in which form becomes more important than substance. The majority argues that bargaining should continue at least on other items, presumably those of a non-monetary nature. Yet the Union itself argued during negotiations (when the University was pressing the Union to delineate its other demands beyond the 9 points) that it would be futile to bargain until the issue of the 9 points had been resolved. Here is an extract from the Union's own minutes of the April 17th bargaining meeting:

...John Parker said that there was one question. He said that they were here to negotiate a collective agreement. He noted that the Faculty Association's agenda included details around separation. But he had questions about the rest of the proposals that would normally come. He said that before he could proceed, they would need the rest of the proposals. He requested the Faculty Association's total package of proposals and noted that this was not an unusual request.

Michael [Mitchell, the Union's spokesman] asked: "Are you refusing to proceed?" Parker said, "No, but before we sit down to negotiate a collective agreement, we want to see the total proposals."

Michael said that all other matters sort of pale in comparison to the importance of the issues raised here regarding separation. In the ordinary situation it might make sense to talk about the other issues, but it was more difficult to negotiate sensibly when, as here, we didn't know what the future would be of the institution. Michael gave, as an example, the grievance procedure. We didn't know whether it was going to be a grievance procedure for a university or for another kind of institution, and what was the point of negotiating a grievance procedure if you didn't know what kind of institution it was supposed to be suitable for. Michael said the University has said that "We're getting rid of you as of July 1, 1986" but you still want the rest of our proposals.

Parker said that he was here to negotiate all facets of a collective agreement. He would raise the issues of separation with his principles [sic] and a policy would be developed which would be communicated to the Faculty Association, but obviously there were other demands that would have to be dealt with.



Michael asked Parker to explain why the University was anxious to negotiate the other matters given that the ultimate responsibility could rest with a new and independent body.

Parker said that he respected that the Faculty Association had these proposals but he wanted the Faculty Association to put its entire position forward and it was unusual if he didn't want that. Michael said, "You're asking for the rest of the proposals?" Parker said "yes". Michael said, "Why now?" Parker said "You're raising issues of the future, I must raise questions of the relationship between the Faculty Association and the Conservatory." Michael said, "But is this in the context of the University or another body?"

Parker said that the Faculty Association was currently dealing with the body it was certified to deal with. He indicated that they would negotiate all of these proposals....

13. Almost two months later the Union changed its position and did submit the balance of its proposals to the University but by that time had already threatened that it was considering legal action against the University. So the inference can be drawn that its change of position was prompted at least as much by its desire to tidy up its own house prior to charging the University with refusing to bargain and with delaying bargaining than by any desire to facilitate the collective bargaining process.

14. But the Union's position during that April bargaining meeting clearly illustrates the impracticality of expecting the parties to continue fruitful negotiations while the issue of the 9 points is hanging over the bargainers' heads. Even a non-monetary contract clause such as a grievance procedure can't be resolved. The 9 point program contains issues with such implications for the parties that no responsible negotiator on either side should be expected to continue bargaining until that Damocles sword has been removed from the bargaining table.

15. The argument of the majority, that allowing a party against whom allegations of bad faith bargaining have been raised to suspend negotiations until the charges have been dealt with risks rewarding a guilty party, is a position of this Board which is generally supportable but which like any policy must be rationally applied to the unique circumstances of each case. The Board's position has been developed primarily through cases where the Board had grounds to suspect an anti-union motive behind the suspension of bargaining. No such motive has even been alleged here. The suspension of bargaining was simply a pragmatic response by the University to the unwillingness of the Union to modify or drop its 9 point program demand until it could present its case to this Board. The Board's virtually automatic guilty verdict ignores the unique facts of this case. The University made the only practicable collective bargaining decision available to it in the circumstances. That should hardly be seen as a violation of section 15 of the Act.

16. I agree with the majority that the University acted quite properly in refusing the Union's fishing expedition demands for information, and that no violation of the Act can be inferred from the delays experienced in bargaining between these parties to date. At least on those two issues the majority hit the right note.

#### **ADDENDUM (OF THE MAJORITY)**

1. With respect to the scope of the duty to bargain, Board Member Gallivan concluded on the facts that the university had bargained about the 9 point programme but had said "no"

to the union's proposals; the dissent sets out a lengthy excerpt from one negotiating meeting in support of this factual finding. With respect, the majority disagrees. The majority has concluded on the totality of the evidence, including the excerpt noted in the dissent and the submissions of the respondent, that the university's position was that the 9 points were "off limits" for discussion, i.e., the programme need not be bargained at all, in part, because the union was purportedly acting on behalf of the Conservatory as an "institution" and not behalf of the employees in the bargaining unit. The majority has already commented on those arguments in its decision. With respect to the dissent, however, the majority wishes to note that the majority found the *reason* for saying "no" was contrary to section 15 of the Act. This is not a subtle or academic difference but one which goes to the heart of collective bargaining. As the majority decision makes clear, the university is not required to *agree* to the union's proposals. But, the university is required to respond, to state its position with an explanation. One party cannot unilaterally declare some items (in this case, the 9 point programme) entirely "off-limits" for discussion. In the majority's opinion, the dissent has ignored the reasons given by the respondent for its refusal to bargain concerning the 9 point programme and ascribed other reasons. Moreover, the majority also strongly disagrees with the factual finding that the invitation to the union president to sit on the implementation committee was a "counter-offer". It is clear from the university's position that the invitation was entirely outside the realm of bargaining. Again, with respect, the dissent has ascribed a character to the invitation expressly denied by the university.

2. The majority also takes serious issue with the dissent's concept of good faith bargaining. In paragraph 7 of the dissent, it is stated that the Board's decision will "delay the real bargaining that will take place after the union's 9 points are disposed of ...". And, in the next paragraph, it is asserted that an interventionist role for the Board is ensured "given its reluctance to decide that certain demands are beyond the pale of good faith bargaining". The majority is expressly *not* taking a interventionist role in bargaining by refusing to assess the *content* of the demands. It is not for the Board to comment on the wisdom of proposals or priorities of the parties, to characterize some as "ludicrous" or "beyond the pale" except where the demands are illegal or the content reveals an intention not to conclude a collective agreement. The Board is not proceeding down the American path and rejects the mandatory-directory analysis for the reasons stated earlier. The majority agrees with the comment in paragraph 8 of the dissent that the university has no legal obligation to concede to the union's requested "veto" over divestment. However, the dissent's recognition that the union has the right to resort to economic sanctions, in the majority's opinion, underscores the majority's position that, in the absence of improper motive, the disposition of the 9 point programme is for the *parties*, not the Board, to determine.

3. The majority also has some comments about the analysis in the dissent of the refusal to bargain pending the disposition of the complaint by the Board. It is true that the union stressed the importance of the 9 point programme. It is also true that the complete package of union proposals was delivered in June. The dissent recognizes that "allowing a party against whom allegations of bad faith bargaining have been raised to suspend negotiations until the charges have been dealt with risks rewarding a guilty party is a position of the Board which is generally supportable". The dissent, however, distinguishes between suspension of negotiations where an improper motive is suspected for the suspension and the suspension in the instant case which is characterized as a "pragmatic response by the university to the unwillingness of the union to modify or drop its 9 point programme demand until it could present its case to this Board". If the dissent is implying there should be allegations of unfair

labour practices in addition to section 15 before suspension would be improper, the majority does not agree. With respect, such a position will only encourage multiple allegations of unfair labour practices. If the suspension of negotiations is to be characterized as improper or not only *after* the Board has disposed of the merits of the other allegations, this does nothing to encourage the parties to continue negotiations. If the implication is that an express finding of anti-union animus is required before suspending negotiations is improper, the majority rejects the imposition of that additional element which can only be determined *after* the entire matter is dealt with by the Board. It will *always* be “pragmatic” to stop negotiations until the Board issues its decision. The dissent ignores the facts of this case that the union’s emphasis on the 9 point was *followed* by an express desire to continue negotiations on other matters and by Parker’s stated position that discussions could continue. It is true that Parker’s principals thought otherwise. The majority, for the reasons stated, rejects that stance. Again, as noted, the parties are represented by experienced negotiators whom the Board need not instruct on mechanisms to maintain flexibility pending the outcome of this complaint. The majority’s position on this issue was stated as a matter of general principle for sound labour relations reasons, namely, that a party should not benefit from his or her wrongdoing regardless of the “degree” of that wrongdoing, or whether or not there is a finding of anti-union animus in addition to violations of “non-motive” sections of the Act.

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**1261-85-R** Iris Price et al, Applicant, v. United Steelworkers of America, Respondent, v. **Storwal International Inc.**, Intervener, v. Group of Employees, Objectors

**Practice and Procedure - Termination - First termination application dismissed as untimely - Second application dismissed two months later as not meeting the 45 percent standard - Union requesting bar against further applications - Request denied where no evidence of undue interference with bargaining rights**

**BEFORE:** *R. A. Furness*, Vice-Chairman, and Board Members *H. Kobryn* and *I. Stamp*.

**DECISION OF THE BOARD;** November 6, 1985

1. In a written decision dated October 2, 1985, the Board recorded the facts that this application to terminate the bargaining rights of the respondent had been dismissed. The Board noted that it had reserved its decision on the request of the respondent that a bar be imposed on any further applications to terminate its bargaining rights. The Board stated that it would provide written reasons for dismissing this application and would also make a decision on the request for a bar. These reasons are now set forth.

2. The applicant applied to the Board for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

3. The respondent is the bargaining agent for a bargaining unit of all office, clerical and technical employees of Storwal International Inc. in Pembroke, save and except secretary to the general manager, secretaries in the personnel department, the accountant, supervisors and persons above the rank of supervisor and outside sales staff. There were challenges by the respondent to the list of employees filed by the intervener. After a review of these challenges it was agreed by the parties that the list for the purpose of the count consisted of thirty-three names and that the applicant had filed a statement of desire in support of the application which had apparently been signed by sixteen of these thirty-three persons. It appeared to the Board that not less than forty-five per cent of the employees of the respondent in the bargaining unit may have signed the statement of desire. In these circumstances, the Board would normally have inquired into the origination, preparation and circulation of the statement of desire in order to determine whether not less than forty-five per cent of the employees in the bargaining unit had voluntarily signified in writing on August 29, 1985, the terminal date of the application and being the time as determined under section 103(2)(j) of the *Labour Relations Act*, that they no longer wished to be represented by the respondent. However, the objectors filed a counter statement of desire in opposition to the application to terminate the bargaining rights of the respondent. The counter statement of desire appeared to contain the signatures of fourteen employees of the intervener. Three of the persons who had apparently signed the statement of desire in support of this application had also apparently signed the counter statement of desire in opposition to this application. The Board explained to the parties that because of the apparent degree of correspondence between the names on the statement of desire and the counter statement of desire, it would inquire into the origination, preparation and circulation of the counter statement of desire because if the Board were to find that the counter statement of desire represented the voluntary wishes of the employees who signed it, the number of employees who had unequivocally signed the statement of desire would be

reduced from sixteen of thirty-three employees to thirteen of thirty-three employees, which is less than the forty-five per cent referred to in section 57(3) of the *Labour Relations Act*.

4. The Board inquired into the origination, preparation and circulation of the counter statement of desire. After hearing the evidence and representations with respect to the origination, preparation and circulation of the counter statement of desire, the Board ruled that it represented the voluntary wishes of the employees who had signed it.

5. The respondent accepted that the statement of desire represented the voluntary wishes of the employees who had apparently signed and adopted the position that there was no need for the Board to inquire into the origination, preparation and circulation of the statement of desire if the Board found that the counter statement of desire represented the voluntary wishes of the employees who signed it. The applicant agreed that there was no need in such circumstances to inquire into the origination, preparation and circulation of the statement of desire. After hearing the representations of all the parties, the Board ruled that it would not inquire into the origination, preparation and circulation of the statement of desire.

6. Three employees apparently had changes of mind in that they initially apparently signed the statement of desire in support of this application and subsequently signed a counter statement of desire revoking their support for the statement of desire against the respondent and reaffirming their allegiance to the respondent. In considering the voluntary acts in this application, the last voluntary response prior to the terminal date was the counter statement of desire. In these circumstances, the Board found that the effect of the counter statement of desire was to reduce the number of persons who had apparently signed the statement of desire in support of this application from sixteen to thirteen. See *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387. In these circumstances, the Board was not satisfied that not less than forty-five per cent of the employees of the respondent in the bargaining unit had voluntarily signified in writing on August 29, 1985, the terminal date fixed for this application and the time as determined under section 103(2)(j) of the Act, that they no longer wished to be represented by the respondent.

7. The respondent urged the Board to apply a bar of between four and six months to any further application to terminate their bargaining rights. This request was opposed by the other parties to this proceeding. Section 103(2)(i) of the Act states:

(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

The Board clearly has a discretion to exercise the powers under section 103(2)(i). Any consideration of the exercise of this discretion has taken into account the policy considerations which the Board set forth in *Trinidad Leaseholds (Canada) Ltd.*, 52 CLLC 17,005, where the Board stated at page 1355:

The intent clearly is to stabilize the conditions essential to collective bargaining for a reasonable period following a determination of the question of representation so as to encourage, in the one instance, the initiation and development of an effective collective bargaining relationship, and in the other, the maintenance and improvement of an established collective bargaining relationship. Regulations 7(3) and 7(4), in short, propose that where a rightfully established collective bargaining relationship exists, the right of employees to select a new bargaining agent and so of that bargaining agent to seek certification, shall be weighed against the desirability of securing stability and continuity in collective bargaining.

8. The respondent referred only one authority to the Board. The case referred to by the respondent was *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791. In that case an earlier application by the same employees, made during the open period, was dismissed on the merits several days before the instant application and on the same day as a conciliation board was appointed. At pages 804-805, the Board stated:

16. The *Trinidad Leaseholds Case* and subsequent decisions based on its principles stand for the proposition that when a second application for certification or termination is made upon the heels of a prior application involving the same parties, in determining whether it should refuse to entertain the second application, the Board must balance the right to test an incumbent trade union's strength among the employees it represents at an appropriate time against the maintaining of continuity and stability in an existing collective bargaining relationship. Stated another way, once a representation issue has been dealt with on its merits and in the absence of special circumstances, then an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with that employer for a collective agreement on behalf of those employees it represents.

17. In the instant case, the original application to terminate the bargaining rights of the respondent was dismissed because the applicants were unable to satisfy the Board that a majority of the employees in the bargaining unit no longer wished to be represented by the respondent. Following the giving of notice by the respondent of its desire to bargain, it did not try to enter into active negotiations with the intervener pending the Board's disposition of the termination application. The respondent, however, wasted no time in asserting its bargaining rights when the initial application was dismissed and immediately made a request for conciliation services. In other words, the respondent did everything that could reasonably be expected of it in the circumstances to maintain the continuity of its collective bargaining relationship with the intervener. We cannot accept the argument that there had been no undue interference with or disruption of bargaining by reason of the second application for termination of bargaining rights. The two applications have not just hampered collective bargaining activity between the respondent and the intervener. They have effectively prevented any bargaining taking place between the parties.

The Board refused to entertain the instant application to terminate the bargaining rights of the respondent trade union. In the same decision, the Board distinguished an earlier decision in *Soo Dairies Limited*, [1971] OLRB Rep. July 439. In *Soo Dairies* an earlier application to terminate bargaining rights had been dismissed on a technicality. The Board stated at page 441:

10. On the facts of the case as set out above, we are of the view that to dismiss the instant application would be too harsh a result for the Board to adopt. The mistake that led to the dismissal of the first application, while fatal to that application, was innocently made. To find that such an innocent mistake should deprive the employees of the remedy afforded by section 43 [now 57] of the Act in the absence of evidence of harassment of the respondent or a failure to act expeditiously, thereby causing undue interference with bargaining, would in our view be a high-handed and arbitrary treatment of the facts of this case. The mere fact that there has been an unsuccessful application (whether it be for certification or for termination)



does not of itself preclude the making of a subsequent timely application. To find otherwise would be tantamount to a refusal by the Board to exercise its discretion under section 77(2)(i) [now 103(2)(i)] in a judicious manner.

11. Although there has been some interference with bargaining as a result of these applications, since these applications were made and heard by the Board within the two month open period contemplated by section 46 [now 61] of the Act, the interference caused by the applications cannot be characterized as "undue" interference which would cause the Board to exercise its discretion under section 77(2)(i) [now 103(2)(i)] against the applicants.

In *Soo Dairies* the Board entertained the application to terminate bargaining rights.

9. The circumstances in *Soo Dairies* involved an innocent mistake and technical reasons for the previous dismissal and no "undue" interference with the bargaining rights. On the other hand, in *Seven-Up*, the dismissal occurred where a trade union had actively pursued its bargaining rights and where an application to terminate bargaining rights had caused undue interference and disruption of bargaining. The Board now considers these circumstances in the present application.

10. An earlier application was filed on May 16, 1985, and was dismissed orally by the Board on July 15, 1985. This decision was confirmed by a written decision dated August 19, 1985. In that decision, the Board held that the application had been filed too early and was untimely under the provisions of the *Labour Relations Act*. The present application was filed on July 15, 1985, and was dismissed orally at the hearing on October 2, 1985, for the reasons set out in this decision. The representations before the Board did not reveal that any bargaining had been engaged in by the parties. The intervener has held itself out as being prepared to meet and bargain with the respondent when it is ready. There is no suggestion before the Board that the respondent has actively attempted to pursue its bargaining rights. In these circumstances, it may not be said that there is any undue interference with the respondent's bargaining rights.

11. For the foregoing reasons, the Board is not, in the exercise of its discretion, prepared to impose a bar pursuant to the provisions of section 103(2)(i) of the *Labour Relations Act*.

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**0861-84-U** Retail, Wholesale and Department Store Union AFL-CIO-CLC, Complainant, **T. Eaton Company Limited**, The Cadillac Fairview Corporation Limited and T.E.C. Leaseholds Limited, Respondents

**Interference in Trade Unions - Reconsideration - Remedies - Unfair Labour Practice - Whether grounds exist for reconsideration of prior decision - Board clarifying employee notice requirement - Issuing amended posting and making new direction to notify employees by separate communication**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *A. Grant* and *L. C. Collins*.

**APPEARANCES:** *James Hayes* and *Bert Scott* for the complainant; *Harvey A. Beresford* and *R. A. Hubert* for T. Eaton Company Limited; *R. E. Hawkins* for Cadillac Fairview Corporation Limited.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER L. C. COLLINS; November 13, 1985**

1. The instant matter involves a complaint under section 89 of the *Labour Relations Act* in which the Board issued a final decision on June 12, 1985. That decision upheld the complaint in part against both the respondent T. Eaton Company Limited and the respondent Cadillac Fairview Corporation Limited, and issued certain orders with respect to each of them.

2. On June 26, 1985, the respondent T. Eaton Company Limited ("Eaton's") wrote to the Board requesting reconsideration of the Board's decision as follows:

We are counsel for the T. Eaton Company Limited and on their behalf respectfully request that the Board exercise its jurisdiction pursuant to Section 106(1) of the Labour Relations Act and reconsider its decision of June 12, 1985 in this matter.

This request is made for the following reasons:

1. The limitations on Eaton's imposed by The Board in its decision are so unclear and contradictory that they are incapable of implementation and application. By way of illustration:
  - (a) The nature of the literature that can be prohibited is ambiguous.
  - (b) The frequency of distribution is ambiguous.
  - (c) The persons entitled to distribute literature are unclear.
  - (d) The time at which literature can be distributed is unclear.
2. The direction contained in paragraph 84 of the decision is inconsistent with the reasons contained in the decision.
3. The decision purports to permit a certain latitude for employees of Eaton's to distribute union literature on the store premises but in failing to provide any clear limits on this latitude unfairly places Eaton's in severe jeopardy when it acts to restrict the distribution of such literature.

4. The decision does not impose any conditions on the Complainant and allows it to act with impunity thereby inviting extensive litigation.
5. The 'Notice to Employees' required to be issued by Order of The Ontario Labour Relations Board is incapable of application and enforcement and is inconsistent with the decision of The Board.
6. The Board by its decision and order in attempting to proscribe the future conduct of Eaton's in relation to unknown future fact situations, has exceeded its jurisdiction.
7. The Board in concluding that the Respondent Cadillac Fairview was at all material times acting on behalf of Eaton's failed to take into consideration the evidence and, more particularly, did not deal specifically with the testimony of the senior officials of Cadillac Fairview and their uncategorical denial that they at anytime acted on behalf of Eaton's.

In view of the foregoing, Eaton's is not proceeding with the posting of the Notice to Employees at this time.

We respectfully request that the Board schedule a hearing for the purpose of entertaining submissions from counsel with respect to this matter."

Paragraph 7 of Eaton's letter presumably is addressed to the order made by the Board not against Eaton's but against *Cadillac Fairview*, and in that regard is interesting in light of the position that Eaton's has maintained on the "agency" issue itself. Whether Eaton's can claim status to raise the objection, however, is academic, since the letter from Eaton's was followed by a letter from the respondent Cadillac Fairview Corporation Limited dated July 9, 1985, and requesting reconsideration on its own behalf. That letter reads as follows:

"We are counsel for The Cadillac Fairview Corporation Limited and T.E.C. Leaseholds Limited.

Pursuant to the provisions of s. 106(1) of the Labour Relations Act, we would request reconsideration by the Board of its decision of June 12, 1985 in the above matter upon the following grounds:

- (1) The Board's finding that Cadillac Fairview acted 'on behalf' of Eaton's is contrary to the direct and uncontradicted evidence of the witnesses, Geoffrey J. Harrison, John N. Dennis, Herbert Vincent and John F. McEwan all of whom specifically stated that at no time did they act on behalf of Eaton's but at all times made an independent decision based on their own observations of the activities in the mall as they related to Cadillac Fairview's own policy with regard to solicitation and the distribution of literature.
- (2) The Board's Order vis-a-vis Cadillac Fairview is inconsistent with the law and in particular the Trespassed Property Act.
- (3) The Board's decision with regard to attendances on the property of Cadillac Fairview and the distribution of material on the property of Cadillac Fairview is without limit as to the number of occasions, frequency of attendance, and manner of solicitation and as such operates to condone the creation of a nuisance.
- (4) The Board by its decision has placed a third party non-employer of the employees in question, i.e., Cadillac Fairview in a worse position than the employer of the employees by requiring the non-employer to grant access to persons where the actual employer of the employees is not required to grant access and as such the Board has thereby exceeded its jurisdiction."

The complainant, upon receipt of the two letters quoted above, responded as follows:



“We have for comment letter from counsel for Eaton’s and Cadillac Fairview dated June 26th and July 9, 1985, respectively concerning their requests that the Board reconsider its decision in this matter dated June 12, 1985.

On behalf of the union it is our submission that neither of the letters raise issues which require either a further hearing in the matter or that the Board should reconsider its decision. The factual and legal issues were exhaustively and thoroughly canvassed in final argument by counsel for all parties. We refer the Board to *The Corporation of the City of Ottawa* [1982] O.L.R.B. Rep. 1698 (Nov.); *Canadian Union of General Employees* [1975] O.L.R.B. Rep. 320 (April); *Sears Canada*, O.L.R.B. File #1305-84-R, unreported, June 25, 1985, in support of the proposition that

‘The Board will not permit its authority to reconsider decisions to become a forum for re-arguing the merits or submissions on matters already dealt with by the Board’  
(*Sears*, *supra* at para. 8)

With respect to concerns raised by the respondents concerning the remedies granted by the Board, we do not accept the implicit and explicit submissions of the respondents that such relief is inappropriate or unfair. The gravamen of that point of view is that in order to prevent possible future fact specific litigation which might be unpredictable in outcome, statutory rights of employees should be delimited from the outset. That view is clearly untenable in view of the fundamental rights at issue in this case. No counsel in this case during final argument invited the Board to draw a detailed code of conduct. The Board has simply provided a basic framework requiring the respondents in limited ways for the first time to consider statutory employee rights in the application of their employee and/or commercial policies.

In conclusion, we submit that it is extraordinary that Eaton’s on the strength of a Section 106 application has simply declared that it ‘is not proceeding with the posting of the Notice to Employees at this time’. We respectfully request that the Board confirm its original award without delay. Needless to say, should further hearings be scheduled by the Board or should further hearings be scheduled by the Board or should this matter be taken further, we reserve any rights open to our client in the circumstances to seek review of those portions of the decision of the Board which were unfavourable to the positions submitted on behalf of the trade union.”

### 3. Section 106(1) of the *Labour Relations Act* provides:

“The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.”

A proper response to the respondents’ requests for reconsideration requires a brief review of the basis upon which the Board has always considered it appropriate to exercise the power granted it under section 106(1) to “reconsider any decision, order, direction, or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling”. That power must be read against the normal expectation in law, specifically included in the words of section 106(1) itself, that once a tribunal has reached and issued a decision on a matter that has been fully litigated before it, that decision is “final and conclusive” (subject, of course, to whatever avenues of review may properly lie to the Courts). Apart from wishing to exhaust section 106(1) as a preliminary to moving in the Courts, any party in receipt of a decision it deems unfavourable may feel perplexed by it, and may well experience an urge to re-state its case to the tribunal in the hope that the tribunal may yet “see the light”, from

the party's point of view. A party on *either* side of any decision may also see in it language that it wished had been expressed otherwise, either to make the decision perhaps a little more favourable to it, or to enable it to better judge for the future what the law, as expressed in the decision, requires its conduct to be. But if one party's "success" in litigation is to be fairly protected, and a reasonable expectation of finality to decisions is to be fostered in the community, a tribunal must resist, except on the most exceptional of grounds, an invitation to re-state, explain, or otherwise attempt to improve the language it has ultimately settled upon in issuing its final decision. As the Board stated in *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096 at 5:

"The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

'Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.'

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board."

And as the Board has also stated, most recently, as the complainant notes, in *Sears Canada Limited*, OLRB File #1305-84-R, unreported, June 25, 1985 at para. 8:

"The Board will not permit its authority to reconsider decisions to become a forum for re-arguing the merits or submissions on matters already dealt with by the Board."

4. The foregoing comments, the Board feels, are dispositive of the grounds for reconsideration put forward in the letter from Cadillac Fairview, and of the grounds put forward in paragraphs 1, 3, 4 and 7 of the letter from Eaton's. The Board has considered *all* of the evidence before it, and the submissions of the various parties, in formulating its June 12th decision. Paragraphs 1, 3 and 4 of Eaton's letter in particular appear to call upon the Board to write more detailed guidelines for the parties which would go beyond the specific factual situations placed before the Board for judgment in this one case, while paragraph 6 of the letter appears to challenge the Board for allegedly doing just that. The Board appreciates the concern of the parties for guidance, but in its judgment has gone as far as it fairly and usefully can on the specific facts before it; no party before the Board encouraged it to attempt to divine a complete code of conduct for the intersecting rights put in issue by this case, and further elucidation of the competing interests in this relatively uncharted area will have to be done, if conflict arises, on a case by case basis.

5. With respect to Eaton's paragraph 6 itself, that the respondent Eaton's had a blanket "no-distribution" policy with respect to literature on its premises was clear from both the evidence and the submissions of Eaton's before the Board, and the intercession of Eaton's on the *single* occasion of distribution by Trish Willis in Bites 'n Nibbles provided additional evidence of that. We note as well, in response to a submission made by Eaton's orally, that the "Trish Willis" incident *was* an example, as the Board views the evidence, of simply an attempt to distribute Union literature in a restaurant of the respondent *prior* to store opening

(paragraph 15 of the Board's decision), and, for the reasons given in paragraph 77, is not synonymous with the kind of "table-hopping" discussed in connection with the *Marshall Field* case.

6. We turn to consider, therefore, the grounds for reconsideration raised by the respondent Eaton's in paragraphs 2 and 5 of its June 26th letter. As noted above, it was clear before the Board that the policy Eaton's had adopted with respect to the distribution of Union literature on store premises was one of blanket prohibition, and Eaton's explained to the Board its reasons for having adopted that stance. The Board, however, did not find Eaton's policy of a *blanket* prohibition sustainable, and ordered Eaton's to make some modifications to its policy in that regard. With respect to "casual conversation", on the other hand, Eaton's had, at least by the time of the proceedings before the Board, articulated a policy that in general was sufficient to satisfy both the complainant and the Board, and no order from the Board requiring Eaton's to adopt a different policy in *that* regard appeared necessary.

7. There remained, however, the concern of the Board with ensuring communication to the *employees* of Eaton's of the policy regarding casual conversation that had been articulated only in the hearings before the Board, in light of the statements of Eaton's in, for example, its letters of May 9, 1984, and July 24, 1984, which are set out in the original decision. This was of particular concern because "casual conversation" is, by its nature, something which employees engage in on their own, as opposed, for example, to "mass" distribution of propaganda which the evidence shows takes place under the guidance and instruction of the Union. In light of the posture taken by Eaton's on the subject of casual conversation before the Board, however, the Board was hopeful that the problem created by those earlier letters could be solved by Eaton's including a reference to its own position in the Notice it was being otherwise directed by the Board to send to employees. In that way, the problem which the letters created could have been rectified without having to submit Eaton's to a further finding of an unfair labour practice under the Act. The Board in its original decision specifically refrained, therefore, from making a finding either way (paragraphs 19, 82) on the letters purporting to set out at an earlier point in time Eaton's position on the broad question of "soliciting" on the premises.

8. The respondent Eaton's, however, has balked at being called upon to so communicate its policy on "casual conversation", at least in the form of a Board Notice and in language edited by the Board, in the absence of a Board finding of liability in that regard. Such a finding is not, on the evidence before us, difficult to make. Eaton's in its letter of May 9, 1984, asserted:

"Employees generally have been informed that the Law prohibits solicitation for union members during working hours *and further that solicitation is prohibited by Company Policy.*"

More explicitly, the letter of July 24, 1985, stated:

"I would like to point out to you that these telephone numbers are Company business numbers and are not to be used to receive or make calls regarding union business. The employees have been so informed *and you may choose to also inform them that solicitation on Company premises is not permitted.*"

[emphasis added]

The letters were issued over the signature of Mr. Hubert, Eaton's Employee Relations Manager, and on their face appear to assert a prohibition which would include the act of one



employee seeking in casual conversation to encourage another employee to become a member of the Union anywhere on Eaton's premises, whether the employees happen to be on working or *non-working* time. With respect to the July 24th letter, in particular, Mr. Hubert testified frankly that he could not say for certain what he had intended the last sentence to apply to at the time, but he felt that one ought to read it in the context of the telephone usage otherwise referred to in the letter.

9. There is also evidence before the Board from Ms. Currie that, as a practical matter, she would expect casual conversation in the store to embrace the subject of the Union, and from Trish Willis that, at least in *her* department of 19 people, casual conversation about the Union was not unusual or inhibited. But Ms. Willis has demonstrated, in her actions in the campaign and her demeanour before the Board, an aggressive kind of leadership that the Board cannot assume would be equally present within other departments, and the Board is prepared to accept the submission of the Union that the effect in general terms of the prohibition set out in Eaton's correspondence, in its unqualified form, would be such as to at least, in the words of the Union, "cast a cloud" over the average employee seeking to freely exercise his or her rights to discuss the Union within the store, without fear of employer recrimination, and without having to look over his or her shoulder. It seems to us that the employer must, in a context this sensitive, bear the responsibility for the words it chooses, and a communication of this type by the employer is to be judged on the basis of its reasonable and likely impact. If that impact is one which would unnecessarily and improperly interfere with the exercise of statutory organizing rights, the action of the employer must be characterized as a violation of section 64. Again, as the Board noted in its original decision in a quote from *Skyline Hotel*, [1980] OLRB Rep. Dec. 1811, paragraph 56:

"As has often been noted, however, the trade union will not in every case be required to prove by affirmative evidence the existence of an anti-union motive. This is so because the effect of certain types of conduct is so clearly foreseeable that an employer may be *presumed* to have intended the consequences of his acts: *A.A.S. Communications*, *supra*; *G. W. Martin Lumber*, [1980] OLRB Rep. May 737; *Bank Canadian National*, [1980] 1 Can. LRB 470; *Radio Officers' Union v. NLRB*, (1954) 33 LRRM 2417."

Such broadly-defined "no-solicitation" rules as were promulgated in the letters here in evidence, it seems to us, falls within that class of conduct.

10. We remain, however, generally content with the policy on casual conversation put forward by Eaton's in the course of the hearings before the Board, and, having heard from the parties, we believe that our relief order should fairly reflect the fact that it is essentially Eaton's own position that is being communicated to employees, not one imposed by order of the Board. The reference to the issue of "casual conversation" will accordingly be deleted from the Board form of Notice which Eaton's has been directed to communicate to its employees. Instead, Eaton's will be directed to communicate its policy directly to employees, in the form discussed below.

11. The policy of Eaton's as stated before the Board is that Eaton's does not seek to control casual conversation amongst its employees *at any time* on the store premises, so long as such conversation does not interfere with the proper operation of the store, or become an irritant to other employees. The first branch of the exception is in words clearly acceptable to the Board, and represents in broad terms the thrust of what the Board has understood the concern of Eaton's to be. Equally clearly, persistent attempts by employees to engage other

employees in conversation about the Union against their will, particularly (although not solely) while such employees are on duty, might well become an irritant to those employees, and reach a point where the proper operation of the store is being affected. The employer Eaton's, in the face of any such complaints, will have to make a judgment as to what is reasonable in that regard, as it would be required to do in the case of *any* employment-related dispute brought to its attention by conflicting employees. What the Board cannot lend its authority to in the context of this case, however, is language which will suggest that a strongly anti-Union employee merely by complaining about mention of the subject of unionization can force curtailment of any such discussion. The evidence makes clear that there already is within the store's employee complement a contingent strongly opposed to the complainant Union, and to appear to grant to such employees effectively a power of "veto" over any conversations they might hear and find distasteful would have the likely effect of nullifying the very rights the respondent appears to be recognizing.

12. The respondent Eaton's accordingly is directed to communicate *forthwith* in written form to its employees, in a letter standing by itself or otherwise, the following statement on the subject of casual conversation:

As we advised The Ontario Labour Relations Board, the Company does not seek to control on store premises what employees talk about in casual conversations that occur during either working or non-working hours. In other words, employees are at liberty to talk about unions during working or non-working hours on the same basis as they would talk about any other subject, so long as the proper operation of the store is not interfered with.

13. In light of the requirement to now issue a fresh form of Notice to Eaton's pursuant to the direction of the Board in paragraph 84(b) of its original decision, and of the views of our colleague Mr. Grant, the Board hereby substitutes the Appendix attached hereto for the Appendix attached to the original decision of June 12, 1985. The Notice to be delivered to employees will, as a result, more directly parallel the language employed by the Board in paragraph 82 of the decision itself, and thus minimize the possibility of confusion being caused to anyone reading the Board's decision in full.

14. The Board anticipates that there will be no further delay on the part of the respondent Eaton's in carrying out the directions of the Board.

#### **DISSENTING OPINION OF BOARD MEMBER A. GRANT;**

1. The Board's original decision went a long way toward accepting the business concerns expressed by Eaton's in the proper functioning of its store and restaurants and, given the apparent lack of business justification on the part of Cadillac Fairview in seeking to limit peaceful solicitation by Union organizers in the *particular* area of the Mall and at the *particular* time of day at issue before us, I felt compelled to join in the original decision of the Board in all of its aspects. So long as the Notice to be issued by Eaton's fairly reflects the accommodations found due to Eaton's (and I note that the panel has attempted to respond to the concerns raised before us on reconsideration), I can continue to support that aspect of the decision. I also can see the value in having Eaton's clearly communicate to its large number of employees the policy it articulated before this Board with respect to "casual conversation" on its premises. I am not, however, able to join with my colleagues in making the specific finding that Eaton's in its letters of May 9th and July 24th, 1984, was guilty of a violation

of the *Labour Relations Act*. I do not believe, and I do not think the majority finds, that Eaton's in writing those letters was actually turning its mind to the question of "casual conversation". Any misimpression conveyed by those letters, therefore, would have been wholly innocent on Eaton's part, and should not, in my view, be characterized by this Board as a violation of the *Labour Relations Act*.

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## Appendix

### The Labour Relations Act

# NOTICE TO EMPLOYEES

Issued by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD.

FOLLOWING HEARINGS BEFORE THE BOARD INTO THE COMPLAINT FILED BY THE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, THE BOARD RULED THAT OUR POLICY PROHIBITING MASS DISTRIBUTION OF UNION LITERATURE AT ANY TIME AND AT ANY PLACE ON STORE PREMISES HAD TO BE MODIFIED SO AS TO PERMIT SUCH DISTRIBUTION ON AN OCCASIONAL BASIS PRIOR TO STORE OPENING, BOTH ON THE SALES DESKS AND IN BITES 'N NIBBLES, BY EMPLOYEES NOT YET ON DUTY.

A MORE COMPLETE DISCUSSION OF THE LIMITATIONS ATTACHING TO THIS FORM OF DISTRIBUTION IS SET OUT IN THE DECISION OF THE BOARD ITSELF.

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T. EATON COMPANY LIMITED















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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1985

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**1446-84-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Colautti Construction Ltd., (Respondent) v. Employees Association of Colautti Construction Ltd., (Intervener).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (25 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (25 employees in unit).

**1461-84-R:**Retail, Wholesale and Department Store Union, (Applicant) v. Sears Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at its service center in Kingston regularly employed for not more than 24 hours per week and students employed as office and clerical employees during the school vacation period at the respondent's service center in Kingston save and except foremen, managers, supervisors, persons above the rank of foreman, manager, and supervisor, security staff, personnel department staff and management trainees." (400 employees in unit).

**2259-84-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Sears Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its service centre at Peterborough, Ontario, save and except foremen, managers, supervisors, persons above the rank of foreman, manager and supervisor, security staff, personnel department staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (86 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).



**2306-84-R:** Canadian Union of Public Employees, (Applicant) v. Kinark Child and Family Services, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Thunder Bay, Ontario, employed in the respondent's native program, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, staff training co-ordinator, secretary co-ordinator - personnel, office staff, maintenance staff, child care teachers employed in the cultural awareness center, persons employed for not more than 24 hours per week and students employed during the school vacation period." (58 employees in unit).

Unit #2: "all employees of the respondent in Thunder Bay, Ontario, employed in the respondent's non-native program save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, psychologists, social workers included in the professional resource group, staff training co-ordinator, secretary co-ordinator - personnel, office staff, maintenance staff, child care teachers employed in the cultural awareness center, persons employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in unit).

**3484-84-R:** United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Delft Blue Farms Incorporated, Grodell Foods Limited, Grober Farms Ltd., (Respondents) v. Group of Employees, (Objectors).

Unit: "all employees of the respondents in the Municipality of Cambridge, Ontario, save and except plant manager, persons above the rank of plant manager, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0254-85-R:** Service Employees International Union Local 204 affiliated with the S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Loomis Messenger Service, a division of Loomis Courier Service Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working in and out of the Municipality of Metropolitan Toronto and the City of Mississauga, save and except dispatchers and supervisors, persons above the rank of dispatcher and supervisor, and office and sales staff." (59 employees in unit).

**0343-85-R:** United Steelworkers of America, (Applicant) v. Canadian Timken, Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and service staff and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0818-85-R:** Bakery, Confectionery & Tobacco Workers International Union, Local 264, (Applicant) v. Dimpflemeier Bakery Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, drivers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (147 employees in unit).

**1069-85-R:** Laundry and Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Maple Leaf Gardens, Limited, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 27, (Intervener #1) v. International Brotherhood of Electrical Workers, Local Union 353, (Intervener #2) v. Theatrical Wardrobe Union, Local 822, (Intervener #3) v. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada,

Local #58, Toronto, (Intervener #4) v. International Union of Operating Engineers, Local 796, (Intervener #5).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, and those above the rank of foreman, sales, office and clerical staff, security guards, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons in bargaining units which another trade union was entitled to represent as of August 16, 1985." (45 employees in unit).

**1071-85-R;1072-85-R:**London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. 334487 Ontario Ltd. c.o.b. St. Williams Nursing Home, (Respondent).

Unit: "all employees of the respondent at St. Williams save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, office and clerical staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

**1175-85-R;1262-85-R:**London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Aylmer Nursing Home Limited, (Respondent).

Unit: "all employees of the respondent at Aylmer, Ontario, save and except supervisors, persons above the rank of supervisor, and office and clerical staff." (27 employees in unit).

**1272-85-R:**Ontario Public Service Employees Union, (Applicant) v. The Reena Foundation, (Respondent).

Unit: "all employees of the respondent employed in Metropolitan Toronto save and except supervisors and team leaders, those above the rank of supervisor and team leader, office, clerical and administrative staff, persons employed pursuant to the Social Services Employment Program, persons employed pursuant to Special Needs and Youth Secretariat Grants, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*).

**1273-85-R:**Ontario Public Service Employees Union, (Applicant) v. The Reena Foundation, (Respondent).

Unit: "all employees of the respondent employed in Metropolitan Toronto who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors and team leaders, those above the rank of supervisor and team leader, office, clerical and administrative staff, persons employed pursuant to the Social Services Employment Program and persons employed pursuant to Special Needs and Youth Secretariat Grants." (44 employees in unit). (*Having regard to the agreement of the parties*).

**1280-85-R:**International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, (Applicant) v. The Carlton Inn (Toronto) Inc., (Respondent) v. Hotel Employees Restaurant Employees Union Local 75, (Intervener).

Unit: "all full-time and part-time tapmen, bartenders, beverage waiters and waitresses, bar boys and improvers of the respondent in Metropolitan Toronto." (7 employees in unit). (*Having regard to the agreement of the parties*).

**1394-85-R:**Ontario Nurses' Association, (Applicant) v. Ontario Cancer Treatment and Research Foundation Windsor Clinic, (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in Windsor in a nursing capacity, save and except senior radiotherapy nurse, senior chemotherapy nurse and persons above the rank of senior nurse." (11 employees in unit). (*Having regard to the agreement of the parties*).

**1399-85-R:**Teamsters, Chemical, Energy and Allied Workers Local 424, (Applicant) v. Bonded Services International Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except controller, supervisors and those above the rank of supervisor." (20 employees in unit). (*Having regard to the agreement of the parties*).

**1407-85-R:**Canadian Union of Postal Workers, (Applicant) v. Canada's Capital Building Services Limited, (Respondent).

Unit: "all employees of the respondent at 4567 Dixie Road, in the City of Mississauga, Ontario, save and except supervisors and persons above the rank of supervisor." (48 employees in unit). (*Having regard to the agreement of the parties*).

**1417-85-R:**United Steelworkers of America, (Applicant) v. Trigild Limited and 619193 Ontario Limited c.o.b. as Topper Products, (Respondents).

Unit: "all employees of the respondents in the town of Vaughan, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (40 employees in unit). (*Having regard to the agreement of the parties*).

**1423-85-R:**Canadian Union of Public Employees, (Applicant) v. Peter Tomlinson c.o.b. as Peter Tomlinson (Cleaning Services), (Respondent).

Unit: "all employees of the respondent in Victoria County, save and except Manager, persons above the rank of Manager, persons regularly employed for not more than 24 hours per week and students employed during the vacation period." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1436-85-R:**Toronto Typographical Union Local 91, (Applicant) v. Fitzhenry and Whiteside Ltd., (Respondent).

Unit: "all office employees of the respondent at Markham, Ontario, save and except data processing manager, persons above the rank of data processing manager, secretary to the President, accountant, outside sales staff and students employed during the school vacation period." (43 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1437-85-R:**Ontario Public Service Employees Union, (Applicant) v. Lee Ambulance Service Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga save and except owner-operator, supervisors, persons above the rank of supervisor, and persons regularly employed for not more than twenty-four (24) hours per week." (6 employees in unit). (*Having regard to the agreement of the parties*).

**1450-85-R:**Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Culinar Inc., (Respondent).

Unit: "all employees of the respondent at its Vachon Division in Metropolitan Toronto, save and except dispatcher, those above the rank of dispatcher, clerical, office and sales staff (including route salesmen)." (7 employees in unit). (*Having regard to the agreement of the parties*).

**1455-85-R:**Ontario Secondary School Teachers' Federation, (Applicant) v. The Kent County Board of Education, (Respondent).



Unit: "all occasional teachers employed by the respondent in its secondary school panel in the County of Kent, save and except employees in the bargaining units for which any trade union held bargaining rights as of September 12, 1985." (60 employees in unit). (*Having regard to the agreement of the parties*).

**1457-85-R:**Ontario Public Service Employees Union, (Applicant) v. Mini-Skool Limited, (Respondent).

Unit: "all employees of the respondent at 3153 Cawthra Road, Mississauga, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period, save and except assistant supervisors and persons above the rank of assistant supervisor." (6 employees in unit). (*Having regard to the agreement of the parties*).

**1464-85-R:**Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Marlo Precision Machining Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in its Eastern Precision Machining Division in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

**1470-85-R:**International Association of Machinists and Aerospace Workers, (Applicant) v. Dickson Brothers Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Fort Erie, save and except foremen, those above the rank of foreman, office, clerical and sales staff." (18 employees in unit). (*Having regard to the agreement of the parties*).

**1471-85-R:**Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. 129682 Canada Ltd. carrying on business as TCB Farmshop, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, clerical, office and sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

**1473-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 46, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance in the Municipality of Metropolitan Toronto, save and except property manager, persons above the rank of property manager, office and clerical staff and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

**1486-85-R:**Energy and Chemical Workers Union, (Applicant) v. Canadian Oxy Chemicals Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Fort Erie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

**1493-85-R:**The United Brotherhood of Carpenters and Joiners of America, Local 3054, (Applicant) v. Huron Steel Fabricators (London) Limited, (Respondent).

Unit #1: "all employees of the respondent at London save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the Township of Westminster save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

**1504-85-R:** United Steelworkers of America, (Applicant) v. Armstrong World Industries Canada Ltd., (Respondent).

Unit: "all employees of the respondent at its Sonotrol Division in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, technical and sales staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

**1506-85-R:** Labourers' International Union of North America, Local 491, (Applicant) v. B & B Enterprises, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of foreman." (12 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

**1521-85-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Jane Wilson Towers Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at 160, 170, 180 and 200 Chalkfarm Drive, Downsview, Ontario, save and except Property Manager and persons above the rank of Property Manager." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1530-85-R:** Local 473 Sheet Metal Workers' International Association, (Applicant) v. Dresden Industrial Company (Canada) Limited, (Respondent).

Unit: "all employees of the respondent at Rodney, save and except foremen, persons above the rank of foreman, office staff and outside sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1531-85-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Applicant) v. 430882 Ontario Limited c.o.b. as Prokote Limited, (Respondent).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

**1545-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Canadian Conduit & Cable Constructors Inc., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1556-85-R:**United Steelworkers of America, (Applicant) v. Nissin Transport (Canada) Inc., (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1563-85-R:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Border Steel Limited, (Respondent).

Unit: "all employees of the respondent at Windsor, save and except foremen, those above the rank of foreman, clerical, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

**1588-85-R:**United Brotherhood of Carpenters and Joiners of America Local 675, (Applicant) v. Tri-Par Interior Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**1599-85-R:**United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. D. Gabourie Plumbing & Heating (1977) Ltd., (Respondent).

Unit #1: "all plumbers', plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).



**1601-85-R:**Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Simcoe Block (1979) Limited, (Respondent).

Unit #1: "all employees of Simcoe Block (1979) Limited at its plant at 113 Tiffin Street in the City of Barrie, Ontario, save and except non-working foremen, persons above the rank of non-working foremen, office and sales staff, persons employed regularly for not more than 24 hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of Simcoe Block (1979) Limited at its plant in the Town of Bracebridge, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff, persons employed regularly for not more than 24 hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*).

Unit #3: "all employees of Simcoe Block (1979) Limited at its retail store at 12 Sarjeant Drive in the City of Barrie, Ontario, save and except manager, persons above the rank of manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #4: (See: *Applications for Certification Withdrawn*).

**1603-85-R:**Service Employees Union, Local 210, affiliated with Service Employees' International Union, AFL-CIO-CLC, (Applicant) v. Beaver Food Limited, (Respondent).

Unit: "all employees of the respondent at Glengarda School in Windsor, save and except food supervisor and persons above the rank of food supervisor." (5 employees in unit). (*Having regard to the agreement of the parties*).

**1604-85-R:**The Alliance Employees Union, (Applicant) v. Union of Energy Mines and Resources Employees - PSAC, (Respondent).

Unit: "all employees of the respondent in Ottawa, save and except the national president and assistant to the president." (3 employees in unit). (*Having regard to the agreement of the parties*).

**1615-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Hurley Brothers Ltd., (Respondent).

Unit: "all employees of the respondent at 8200 Dixie Road, Brampton, save and except supervisors and persons above the rank of supervisor." (38 employees in unit). (*Having regard to the agreement of the parties*).

**1616-85-R:**Graphic Communications International Union, Local 512-S, (Applicant) v. Bonar Rosedale Plastics Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Lindsay, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, technical, quality control and laboratory staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (71 employees in unit). (*Having regard to the agreement of the parties*).

**1617-85-R:**Welland Typographical Union, No. 927, (Applicant) v. The Welland Guardian Express Ltd., (Respondent).

Unit: "all employees of the respondent in Welland, save and except the publisher, those above the rank of publisher, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (19 employees in unit). (*Having regard to the agreement of the parties*).

**1625-85-R:**United Food and Commercial Workers International Union, (Applicant) v. Almonte Nursing Home, (Respondent).

Unit #1: "all employees of the respondent in the County of Lanark, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (28 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the County of Lanark regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses." (17 employees in unit). (*Having regard to the agreement of the parties*).

**1629-85-R:**International Woodworkers of America, (Applicant) v. Weber Costello of Canada Limited, (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent in Mississauga, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff and students employed during the school vacation period." (38 employees in unit).

**1633-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. Avid Excavating Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1640-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Mastercraft Bridge and Engineering Construction (Ottawa) Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1652-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. L'82 Construction (509817 Ontario Limited), (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save

and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**1662-85-R:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 128, (Applicant) v. Catalyst Services Ltd., (Respondent).

Unit: “all employees of the respondent in the Municipality of Sarnia and Point Edward, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff, engineers and employees in bargaining units for which any trade union held bargaining rights as of October 2, 1985.” (4 employees in unit). (*Having regard to the agreement of the parties*).

**1666-85-R:**Ontario Public Service Employees Union, (Applicant) v. Home Again Residential Programs for the Handicapped, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses employed in a nursing capacity, office and clerical staff and employees employed on subsidized programs.” (45 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1681-85-R:**United Food & Commercial Workers, Local 206, Chartered by the United Food & Commercial Workers International Union, (Applicant) v. Marks & Spencer Canada Inc. Peoples Division, (Respondent).

Unit: “all employees of the respondent at its Peoples Division in Angus, save and except the store manager, persons above the rank of store manager and secretary to the store manager.” (10 employees in unit). (*Having regard to the agreement of the parties*).

**1690-85-R:**International Union of Bricklayers and Allied Craftsmen, Local No. 2 Ontario, (Applicant) v. Calorific Construction Ltd., (Respondent).

Unit #1: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, and Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**1699-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Stebbins Paving and Construction Limited, (Respondent).

Unit: “all employees of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

**1742-85-R:**Ironworkers District Council of Ontario, (Applicant) v. Tesc Contracting Limited, (Respondent).

Unit #1: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and



except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

### Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**1238-85-R:**United Steelworkers of America, (Applicant) v. Detour Lake Mine, A Joint Venture of Campbell Red Lake Mines Limited and Amoco Canada Petroleum Company Limited (Campbell Red Lake Mines Limited/Operator), (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).

Unit: "all employees of the respondent in the District of Cochrane, save and except foremen, shift bosses, persons above the rank of foreman and shift boss, office and clerical staff, employees in the laboratory and in engineering, instrumentation, geological, and metallurgical departments, security guards, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (160 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	157
Number of persons who cast ballots	128
Number of ballots marked in favour of applicant	68
Number of ballots marked in favour of intervener	56
Ballots segregated and not counted	4

**1253-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Noranda Metal Industries Limited, (Respondent) v. International Brotherhood of Electrical Workers, Local 2345, (Intervener).

Unit: "all employees of the respondent at its Fergus Division, Fergus, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period or on a co-operative training program with the University." (116 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	115
Number of persons who cast ballots	107
Number of ballots marked in favour of applicant	67
Number of ballots marked in favour of intervener	40

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**1477-84-R:**Ontario Nurses' Association, (Applicant) v. Ontario Cancer Treatment and Research Foundation, (Respondent) v. The Canadian Union of Public Employees, (Intervener) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent, at Ottawa, Ontario, save and except Head Nurse (General Division) and Nurse Administrator, employees above the rank of Head Nurse (General Division) and Nurse Administrator, and employees covered by subsisting collective agreements." (43 employees in unit).

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	41

Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	15
Ballots segregated and not counted	5

**0530-85-R:** Alliance Employees' Union, (Applicant) v. Union of Canadian Transport Employees, (Respondent).

Unit: "all office and clerical employees of the respondent in Ottawa, Ontario, save and except financial administrator, secretary to the president, and staff officers." (4 employees in unit).

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

**1215-85-R:** International Ladies' Garment Workers' Union, (Applicant) v. Riviera Slacks Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff designers, persons employed for not more than 24 hours per week and students employed during the school vacation period." (272 employees in unit).

Number of names of persons on revised voters' list	266
Number of persons who cast ballots	235
Number of ballots marked in favour of applicant	128
Number of ballots marked against applicant	105
Ballots segregated and not counted	2

**1342-85-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. A. & H. Bolt & Nut Company Ltd. c.o.b. as The Fastener Centre, (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (43 employees in unit).

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	41
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	12
Ballots segregated and not counted	2

**1359-85-R:** Canadian Paperworkers Union, (Applicant) v. Bracebridge Lumber Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Bracebridge, save and except foremen, persons above the rank of foreman, office and sales staff, log scalers, lumber graders, persons who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in unit).

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3

**1371-85-R:**Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees' Union Local 1000, (Applicant) v. Ontario Hydro, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: "all employees at the Richard L. Hearn Thermal Generating Station at Toronto, save and except shift supervisors, foremen, persons above the rank of foreman, office staff, electrical operators, and technicians." (4 employees in unit).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		1

### Applications for Certification Dismissed - No Vote Conducted

**0777-84-R:**L'Association des Enseignantes et Enseignants Suppleants, (Applicant) v. Le Conseil Scolaire d'Ottawa, (Respondent) v. The Ontario Secondary School Teachers' Federation, (Intervener). (124 employees in unit).

**1763-84-R:**Ontario Public Service Employees Union, (Applicant) v. Confederation College of Applied Arts and Technology, (Respondent). (99 employees in unit).

**2335-84-R:**Ontario Public Service Employees Union, (Applicant) v. St. Clair College of Applied Arts and Technology, (Respondent). (130 employees in unit).

**2957-84-R:**Ontario Public Service Employees Union, (Applicant) v. Algonquin College of Applied Arts and Technology, (Respondent). (140 employees in unit).

**3050-84-R:**Ontario Public Service Employees Union, (Applicant) v. Conestoga College of Applied Arts and Technology, (Respondent). (98 employees in unit).

**3064-84-R:**Ontario Public Service Employees Union, (Applicant) v. Mohawk College of Applied Arts and Technology, (Respondent). (66 employees in unit).

**0689-85-R:**Ontario Secondary School Teachers' Federation, (Applicant) v. Oxford County Board of Education, (Respondent). (86 employees in unit).

**0740-85-R:**Labourers' International Union of North America, Local 1267, (Applicant) v. R.C.P. Inc., (Respondent) v. Group of Employees, (Objectors). (71 employees in unit).

**1210-85-R:**Canadian Union of Operating Engineers and General Workers, (Applicant) v. Abex Industries Ltd. Friction Products Division, (Respondent) v. United Steelworkers of America, (Intervener). (9 employees in unit).

**1223-85-R:**International Brotherhood of Painters & Allied Trades Local Union 1891, (Applicant) v. Rosmar Drywall & Acoustics Ltd., (Respondent). (3 employees in unit).

**1246-85-R:**G.K.L. Industries Employees' Association, (Applicant) v. G.K.L. Industries Ltd., (Respondent). (26 employees in unit).

**1505-85-R:**Teamsters Union Local 938, (Applicant) v. Wen-Hal Inc. and Ontario Sawdust Supply Ltd. (formerly 572940 Ontario Limited c.o.b. as "Ed Randall Sawdust Products"), (Respondent) v. Group of Employees, (Objectors). (26 employees in unit).



**1523-85-R:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. Hunt-Wesson Canada, a Division of/Une Division de Norton Simon Canada Inc., (Respondent) v. Group of Employees, (Objectors). (13 employees in unit).

**1558-85-R:**Office and Professional Employees International Union, (Applicant) v. The Toronto Stock Exchange, (Respondent). (269 employees in unit).

**1608-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Code I Investments Inc., (Respondent) v. Teamsters Local Union No. 230, (Intervener). (3 employees in unit).

**1682-85-R:**Canadian Union of Operating Engineers and General Workers, (Applicant) v. Abex Industries Limited, Friction Products Division, (Respondent) v. United Steelworkers of America, (Intervener). (140 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**1751-83-R:**Christian Labour Association of Canada, (Applicant) v. Marsdale Manor Nursing Home, owned and operated by Versa-Care Limited, (Respondent) v. Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial Workers International Union, (Intervener).

Unit: "all employees of the respondent at Marsdale Manor Nursing Home in Cambridge, Ontario, save and except professional medical staff, registered and graduate nurses, office staff, director of nursing, persons above the rank of director of nursing, and activities director." (39 employees in unit).

Number of names of persons on revised voters' list		38
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		8
Number of ballots marked in favour of intervener		16

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**3356-84-R:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. Pebra Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (107 employees in unit).

Number of names of persons on revised voters' list		107
Number of persons who cast ballots	106	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		46
Number of ballots marked against applicant		57
Ballots segregated and not counted		1

**0986-85-R:**Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Data Security Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, persons regularly employed

for not more than 24 hours per week and students employed during the school vacation period." (16 employees in unit).

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	7
Ballots segregated and not counted	1

**1123-85-R:**United Food and Commercial Workers Union - Local 409, (Applicant) v. Airline Motor Hotel (Fort William) Limited, (Respondent) v. Group of Employees, (Intervener).

Unit: "all employees of the respondent in Thunder Bay, Ontario, save and except department managers, persons above the rank of department manager, office staff, front desk staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (136 employees in unit).

Number of names of persons on revised voters' list	134
Number of persons who cast ballots	124
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	89

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0111-85-R:**Labourers' International Union of North America, Local 837, (Applicant) v. Donn Hope Construction Ltd., (Respondent).

**0757-85-R:**Local 47 Sheet Metal Workers' International Association, (Applicant) v. P.P.G. Industries Canada Limited, (Respondent) v. The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Intervener).

**1424-85-R:**Ready-Mix, Building, Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Simcoe Block (1979) Limited, (Respondent) v. Group of Employees, (Objectors).

**1438-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Essex County Library Board, (Respondent).

**1454-85-R:**The Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Moldex Limited, (Respondent).

**1480-85-R:**Canadian Union of Operating Engineers and General Workers, (Applicant) v. Abex Industries Ltd. Friction Products Division, (Respondent) v. United Steelworkers of America, (Intervener).

**1539-85-R:**Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261, (Applicant) v. Service Star Building Cleaning, (Respondent).

**1561-85-R:**United Steelworkers of America, (Applicant) v. L. P. Systems (Sudbury) Limited, (Respondent).

**1587-85-R:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Chrysler Canada Limited, (Respondent).

**1601-85-R:**Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Simcoe Block (1979) Limited, (Respondent).

**1755-85-R:**United Brotherhood of Carpenters and Joiners of America Local Union 2679, (Applicant) v. Global Sound Systems Ltd. and Soundwood Incorporated, (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0244-85-R:**The Delta Employees Association, (Applicant) v. Delta-Benco-Cascade Limited and Triple Crown Electronics Inc., (Respondent). (*Withdrawn*).

**0681-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. Aveiro Construction Limited, and KBM Construction Division of 414226 Ontario Limited, (Respondents). (*Withdrawn*).

**0824-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents). (*Withdrawn*).

**0978-85-R:**A Council of Trade Unions Acting as Representative and Agent of Teamsters, Local Union 230 and Labourers' International Union of North America, Local 183, (Applicant) v. Ferpac Paving Inc., John Ferzoco Limited, (Respondents). (*Withdrawn*).

**1243-85-R:**Bakery, Confectionery & Tobacco Workers International Union, (Applicant) v. Proctor & Gamble, Biscuit Division Brockville, Ontario and Olsten Temporary Services, (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**0546-85-R:**Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Embassy Hotel (formerly Villa Canale Hotel Inc.), (Respondent). (*Withdrawn*).

**0682-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. Aveiro Construction Limited, and KBM Construction Division of 414226 Ontario Limited, (Respondents). (*Withdrawn*).

**0825-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents). (*Withdrawn*).

**0978-85-R:**A Council of Trade Unions Acting as Representative and Agent of Teamsters, Local Union 230 and Labourers' International Union of North America, Local 183, (Applicant) v. Ferpac Paving Inc., John Ferzoco Limited, (Respondents). (*Withdrawn*).



## CROWN TRANSFER ACT

**1248-85-R;1317-85-R:**The Regional Municipality of Waterloo, Canadian Union of Public Employees, and its Local 1883, (Applicants) v. The Ontario Public Service Employees Union, and the Crown in Right of Ontario, (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2869-84-R:**Mr. Harry Panesar and Mr. Antonio Valente, (Applicants) v. Hotel Employees Restaurant Employees Union Local 75, (Respondent) v. Canadian Pacific Hotels (Chateau Flight Kitchen), (Intervener) v. Group of Employees, (Objectors). (236 employees in unit). (*Dismissed*).

**0687-85-R:**Theresa Lamson, (Applicant) v. United Food and Commercial Workers' Union Local 725, (Respondent) (Re: Title Distributing Limited carrying on business as Economy Fair).

Unit #1: "all employees of the company in Napanee, Ontario, save and except the pharmacist, the store manager, persons above the rank of store manager, persons employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (10 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	9
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

Unit #2: "all employees of the company in Napanee, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the pharmacist, the store manager, and persons above the rank of store manager." (4 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

**0703-85-R:**Debbie Evans, (Applicant) v. United Food & Commercial Workers, Local 206, (Respondent).

Unit: "all retail employees of Ridgeview I.G.A. in Metropolitan Toronto and Ajax save and except for the Store Manager, persons above the rank of Store Manager, Meat Department Manager, and Meat Cutter." (7 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	7
Number of names of persons who cast ballots	6
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5

**1027-85-R:**Jeremy Henderson, Margaret Cousens, Patricia A. Berdan, Gail Corkwright, Paul Winton, Richard McCollow and William A. McCollow, (Applicants) v. International Molders and Allied Workers Union, (Respondent) v. Eberhard Hardware Manufacturing Limited, (Intervener). (10 employees in unit). (*Dismissed*).

**1030-85-R:**Danielle Villeneuve, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent) v. Coca-Cola Ltd., (Intervener).

Unit: "all office employees of the intervener at Ottawa, Ontario, save and except office manager, assistant office manager, persons above the rank of office manager, confidential secretary to the general manager, foremen, sales supervisors, and persons regularly employed for not more than 24 hours per week." (13 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		8

**1107-85-R:**Jerry DeLeeuw, Mark Pruyn and Steven Abele, (Applicants) v. Bakery, Confectionery and Tobacco Workers' International Union, Local 264, (Respondent) v. Elmira Refiners Ltd., (Intervener). (8 employees in unit). (*Dismissed*).

**1114-85-R:**John Persichini, Brenda Tilbury, Margaret Benjamin and Josie Tambeau, (Applicants) v. United Brewers' Warehousing Workers' Provincial Board, (Respondent). (2 employees in unit). (*Dismissed*).

**1153-85-R:**Mark Savory, Ken Savory and Paul Skirrow, (Applicants) v. Christian Labour Association of Canada, (Respondents). (3 employees in unit). (*Dismissed*).

**1259-85-R:**Terry Pithouse, (Applicant) v. Ontario Public Service Employees Union (OPSEU), (Respondent) v. West Lincoln Ambulance Service, (Intervener). (4 employees in unit). (*Granted*).

**1261-85-R:**Iris Price et al, (Applicant) v. United Steelworkers of America, (Respondent) v. Storwal International Inc., (Intervener) v. Group of Employees, (Objectors). (32 employees in unit). (*Dismissed*).

**1297-85-R:**Laurie Fisher & Evalina Van Geutselaar, (Applicants) v. London and District Service Workers' Union, Local 220, (Respondent). (2 employees in unit). (*Dismissed*).

**1395-85-R:**Employees of Modern Building Cleaners, (Applicant) v. Hotels, Clubs, Restaurants, Taverns Employees Union Local 261, (Respondent). (50 employees in unit). (*Withdrawn*).

**1671-85-R:**Gary Hildreth, and the employees of Toronto Mill Stock Co. Ltd., (Applicant) v. Retail, Wholesale and Department Store Union AFL, CIO, CLC, Local 414, (Respondent). (10 employees in unit). (*Granted*).

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**1287-85-M:**Thor Industries Canada Ltd., (Employer) v. Steelworkers of America, (Trade Union). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**3167-84-U:**Haline Cierebiej, Mirosława Nowak, Maria Babej, Helen Bouyoukos, Alicya Lily Czerepok, Krystalo Adreakos and Vassiliki Tsoucalou, (Complainants) v. Textile Processors, Service Trade, Health Care, Professional and Technical Employees International Union Local 351, (Respondent) v. Toronto Hilton Harbour Castle, (Intervener). (*Dismissed*).

**0178-85-U:**Sharon Schofield, (Complainant) v. United Steel Workers of America and Dwain Dryer and Douglas Hart and Gay Lamb, (Respondents). (*Dismissed*).

**0491-85-U:**Mark Hurst, (Complainant) v. Brewery Workers Local Union No. 304 of the Canadian Union of United Brewery, (Respondent) v. Carnation Inc., (Intervener). (*Withdrawn*).

**0638-85-U:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. International Vac Pac Inc., (Respondent). (*Withdrawn*).

**0639-85-U:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. International Vac Pac Inc., (Respondent). (*Withdrawn*).

**0640-85-U:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. International Vac Pac Inc., (Respondent). (*Withdrawn*).

**0641-85-U:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. International Vac Pac Inc., (Respondent). (*Withdrawn*).

**0662-85-U:**Labourers' International Union of North America, Local 1267, (Complainant) v. R.C.P. Inc. and Mark Gernack, (Respondent). (*Dismissed*).

**0767-85-U:**Carpenter Local 249, (Complainant) v. The Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

**0815-85-U:**Maria Tavares, (Complainant) v. Ontario Retail Council and Maple Lodge Farms Ltd., (Respondents). (*Withdrawn*).

**0821-85-U:**Canadian Union of Public Employees, Fred Victor Mission Local, (Complainant) v. Fred Victor Mission of the United Church of Canada, (Respondent). (*Withdrawn*).

**0888-85-U:**Bakery, Confectionery and Tobacco Workers International Union, (Complainant) v. Dimpfmeier Bakery Ltd., (Respondent). (*Dismissed*).

**0921-85-U:**Bakery, Confectionery and Tobacco Workers International Union, (Complainant) v. Proctor & Gamble, Biscuit Division, Brockville, Ontario and Olsten Temporary Services, (Respondents). (*Withdrawn*).

**1080-85-U:**Leslie Ralph Johnson, (Complainant) v. Teamsters Chemical, Energy and Allied Workers Division, Local 424, (Respondent). (*Withdrawn*).

**1096-85-U:**United Food and Commercial Workers International Union, (Complainant) v. Consolidated Beef Corporation, (Respondent). (*Granted*).

**1113-85-U:**Leslie Kowalik, (Complainant) v. Teamsters Union, Local 938, (Respondent) v. Gen-Auto Shippers (Oshawa) Ltd., (Intervener). (*Dismissed*).

**1127-85-U:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL, CIO, CLC), (Complainant) v. F. G. Andriuolo Foods Inc., c.o.b. Swiss Chalet Bar-B-Q, (Respondent). (*Dismissed*).

**1128-85-U:**Wesley George Higgins, (Complainant) v. Joe Jimler, President of Local 200 Glass Workers Union, (Respondent) v. Consumers Glass Company Limited, (Intervener). (*Withdrawn*).



**1145-85-U:**Canadian Union of Public Employees, Local 2219, (Complainant) v. Garson Manor, Nursing Home, (Respondent). (*Withdrawn*).

**1147-85-U:**Mary Davidson, (Complainant) v. Nelson Miller - Union Pres. Local 94 North York Civic Employees Union, Canadian Union of Public Employees, Local 94, 2899 Steeles Avenue West, (Unit #27), North York, Ontario, M3J 3A1, (Respondent). (*Withdrawn*).

**1162-85-U:**Ivy Faulkner, (Complainant) v. Hotel Employees and Restaurant Employees International Union, (Respondent) v. Peel County Feed Co., Marcelo Montenegro, Corporate Food & Beverage Director, (Intervener). (*Dismissed*).

**1163-85-U:**Gerald Zuk, (Complainant) v. Ontario Public Service Employees Union, (Respondent). (*Dismissed*).

**1176-85-U:**Food and Service Workers of Canada, Afsaneh Shafai-Palmer, Terry Sweatman, Paul Rees, Laura Arseneau and Sarah Paul, (Complainants) v. Edwards Books and Art Limited, (Respondent). (*Withdrawn*).

**1183-85-U:**Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Hotz & Sons Company, (Respondent). (*Withdrawn*).

**1203-85-U:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128, (Complainant) v. 3-L Filters Limited, (Respondent). (*Withdrawn*).

**1220-85-U:**United Food & Commercial Workers International Union, (Complainant) v. Delft Blue Farms Inc., Grober Farms Ltd., Grodell Foods Ltd., (Respondent). (*Withdrawn*).

**1249-85-U:**London and District Service Workers' Union Local 220, (Complainant) v. Pioneer Youth Services Limited, (Respondent). (*Withdrawn*).

**1268-85-U:**International Woodworkers of America, (Complainant) v. Jayden Inc., (Respondent). (*Withdrawn*).

**1286-85-U:**Martin Malonowich, (Complainant) v. Union of Operating Engineers (Local 793), (Respondent). (*Withdrawn*).

**1308-85-U:**Edwards Books and Art Limited, (Complainant) v. Food and Service Workers of Canada, (Respondent). (*Withdrawn*).

**1311-85-U:**Labourers' International Union of North America, Local 1267, (Complainant) v. Ralph Spademan's Limited, (Respondent). (*Withdrawn*).

**1313-85-U:**Retail, Wholesale and Department Store Union AFL-CIO-CLC, (Complainant) v. W. R. McRae Wholesale Co. Ltd., (Respondent). (*Withdrawn*).

**1314-85-U:**Ontario Public Service Employees Union, (Complainant) v. Listowel District Association for the Mentally Retarded, (Respondent). (*Withdrawn*).

**1320-85-U:**Health Office and Professional Employees, A Division of Local 206 United Food & Commercial Workers International Union, (Complainant) v. Sara Vista Nursing Centre, Operated by Huronia Nursing Home Ltd., (Respondent). (*Withdrawn*).

**1323-85-U:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Espanola I.G.A., (Respondent). (*Withdrawn*).

**1331-85-U:**International Union of Bricklayers and Allied Craftsmen, Local 3, (Complainant) v. DeJayko Masonry Ltd., (Respondent). (*Withdrawn*).

**1334-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Frastacky Associates Inc., (Respondent). (*Withdrawn*).

**1344-85-U:**Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. The Fastener Centre, a Division of A. & H. Bolt & Nut Company Limited, (Respondent). (*Withdrawn*).

**1345-85-U:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Keeprite Inc., (Respondent). (*Withdrawn*).

**1347-85-U:**United Garment Workers of America, Local #253, (Complainant) v. Salant Canada Limited, (Respondent). (*Withdrawn*).

**1350-85-U:**Union of Bank Employees Local 2104 Canadian Labour Congress, (Complainant) v. American Express Canada Inc., (Respondent). (*Withdrawn*).

**1352-85-U:**Ontario Public Service Employees' Union, (Complainant) v. Home Again Residential Services, (Respondent). (*Withdrawn*).

**1353-85-U:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88, (Complainant) v. 412873 Ontario Ltd. (c.o.b. Swiss Chalet), (Respondent). (*Withdrawn*).

**1354-85-U:**United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Complainant) v. Harold R. Stark Limited, (Respondent). (*Granted*).

**1415-85-U:**United Garment Workers of America, Local 253, (Complainant) v. Cumberland Clothing Limited, Mr. Paul Hecht, President, (Respondent). (*Withdrawn*).

**1416-85-U:**The International Brotherhood of Painters & Allied Trades & Local 1824, (Complainant) v. Barber Glass Limited, (Respondent). (*Withdrawn*).

**1441-85-U:**Douglas Watson, (Complainant) v. Labourers' International Union of North America, Local 1036 (James Lewis, Manager), (Respondent). (*Withdrawn*).

**1442-85-U:**Local 1964 International Brotherhood of Electrical Workers, (Complainant) v. Peterborough Utilities Commission, (Respondent). (*Withdrawn*).

**1443-85-U:**Service Employees Union, Local 183, (Complainant) v. Bond's Ambulance Service, (Respondent). (*Withdrawn*).

**1460-85-U:**Canadian Union of Public Employees, Fred Victor Mission, (Complainant) v. Fred Victor Mission of the United Church of Canada, (Respondent). (*Withdrawn*).

**1489-85-U:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88, (Complainant) v. Cara Operations Ltd., c.o.b. Swiss Chalet Bar-B-Q, (Respondent). (*Withdrawn*).

**1503-85-U:**W. A. Curtis, (Complainant) v. C.P.U. Local Union 134, (Respondent). (*Withdrawn*).

**1542-85-U:**Heather Easterbrook, (Complainant) v. Garson Bus Line c.o.b. Hanmer Bus Lines Inc., (Respondent). (*Withdrawn*).

**1551-85-U:**Ontario Public Service Employees Union, (Complainant) v. Reena Foundation, (Respondent). (*Withdrawn*).

**1552-85-U:**Andre Giroux, (Complainant) v. Sudbury Mine, Mill & Smelter Workers' Union Local 598, (Respondent). (*Withdrawn*).

**1567-85-U:**United Food and Commercial Workers Union, Local 409, (Complainant) v. Dominion Stores Limited, (Respondent). (*Withdrawn*).

**1605-85-U:**Carlo Caruso, Frank Zaffino, Frank Caruso, and Gaitano Caruso, (Complainants) v. Lumber and Sawmill Workers Union Local - 2693, Box 2348, Thunder Bay "P", Ontario, Phone No. 345-9041, (Respondent). (*Withdrawn*).

**1663-85-U:**Sheet Metal Workers International Association, Local Union 562, (Complainant) v. Reitzel Heating and Sheet Metal, (Respondent). (*Withdrawn*).

**1689-85-U:**Gocooldass Sukhraj, (Complainant) v. Reynolds Aluminum Company of Canada Ltd., (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**2698-83-M:**Ontario Nurses' Association Staff Union, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Dismissed*).

**1116-85-M:**Canadian Union of Public Employees and its Local 218, (Applicant) v. The Durham Region Roman Catholic Separate School Board, (Respondent). (*Withdrawn*).

**1170-85-M:**St. Mary's General Hospital, (Applicant) v. London and District Service Workers Union Local 220, (Respondent). (*Withdrawn*).

**1218-85-M:**London & District Service Workers Union, Local 220, (Applicant) v. Trillium Villa Nursing Home, Sarnia, (Respondent). (*Withdrawn*).

**1219-85-M:**London and District Service Workers' Union, Local 220, (Applicant) v. The Corporation of the County of Elgin at Terrace Lodge, Township of Malahide, (Respondent). (*Withdrawn*).

**1305-85-M:**The Canadian Union of Public Employees, (Applicant) v. The Regional Municipality of Waterloo, (Respondent). (*Withdrawn*).

**1333-85-M:**The Corporation of the Town of Oakville, (Applicant) v. Canadian Union of Public Employees Local 1329, (Respondent). (*Dismissed*).



## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**0722-84-OH:** Allen Hawkes, (Complainant) v. Cryovac Division of W.R. Grace & Co. of Canada Ltd., (Respondent). (*Withdrawn*).

**2383-84-OH:** United Electrical, Radio & Machine Workers of Canada, Local 550, (Complainant) v. Camco Inc., (Respondent). (*Dismissed*).

**1173-85-OH:** Margaret Martin, (Complainant) v. Brian Page, (Respondent). (*Withdrawn*).

**1255-85-OH:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128, on behalf of John Sloan, (Complainant) v. 3-L Filters Limited, (Respondent). (*Withdrawn*).

**1303-85-OH:** Sam Papachristos, (Complainant) v. M. M. Products, (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**0319-85-M:** Labourers' International Union of North America, Local 837, (Applicant) v. Donn-Hope Construction Ltd., (Respondent). (*Withdrawn*).

**0373-85-M:** Ontario Sheet Metal and Air Handling Group on behalf of Giffin Sheet Metal Limited and A. G. Baird Limited, (Applicants) v. Robert Brown, Sheet Metal Workers' International Association Local 473 and Ontario Sheet Metal Workers Conference, (Respondents). (*Granted*).

**0407-85-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 Canada, (Applicant) v. Ottawa Carleton Bricklaying and Masonry Ltd. and/or Olivieri Masonry Ltd., (Respondents). (*Withdrawn*).

**0910-85-M:** International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation, Aveiro Construction Limited, Evans-Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Withdrawn*).

**0911-85-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 and Ironworkers' District Council of Ontario, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation, Aveiro Construction Limited, Evans Kennedy Construction Limited and Celtic Construction (London) Limited, (Respondents). (*Withdrawn*).

**1040-85-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. MBD Drywall Systems Ltd., (Respondent). (*Granted*).

**1155-85-M:** United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. Marc Lalonde Carpet (A Division of 375601 Ontario Limited), (Respondent). (*Granted*).

**1301-85-M:** A Council of Trade Unions Acting as Representative and Agent of Teamsters, Local 230 and Labourers' International Union of North America, Local 183, (Applicants) v. John Ferzoco Limited, Ferpac Paving Inc., (Respondents). (*Withdrawn*).

**1479-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. DiGiacomo Canada Inc., (Respondent). (*Granted*).

**1482-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Cooper Construction Company Limited, (Respondent). (*Granted*).

**1497-85-M:**Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Convention & Show Services, (Respondent). (*Withdrawn*).

**1508-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Canadian Dredge and Dock Inc., (Respondent). (*Withdrawn*).

**1528-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Jaddco Anderson Limited, (Respondent). (*Withdrawn*).

**1538-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. 542929 Ontario Limited, (Respondent). (*Withdrawn*).

**1547-85-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. Wonnacott Excavating Ltd., (Respondent). (*Withdrawn*).

**1548-85-M:**The International Brotherhood of Electrical Workers Local Union 804 of the IBEW Construction Council of Ontario, (Applicant) v. H. Pope and Sons Limited and Do It Yourself Electrical Mart, (Respondent). (*Granted*).

**1564-85-M:**Ontario Allied Construction Trades and its affiliate International Union of Operating Engineers, Local 793, (Applicant) v. Electrical Power Systems Construction Association and A.M.B. Investments, Ontario Hydro Darlington Project, (Respondents). (*Granted*).

**1576-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Kipling Paving Company Limited, (Respondent). (*Withdrawn*).

**1577-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Aberdeen Highlands Construction Limited, (Respondent). (*Withdrawn*).

**1578-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Vex Concrete Incorporated, (Respondent). (*Granted*).

**1591-85-M:**Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Monia Construction & Architectural Design Limited, (Respondent). (*Granted*).

**1600-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, (Applicant) v. Calorific Construction, (Respondent). (*Withdrawn*).

**1611-85-M:**Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. National Drywall Ltd., (Respondent). (*Withdrawn*).

**1619-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Robert B. Somerville Co. Ltd., (Respondent). (*Withdrawn*).

**1624-85-M:**Carpenters' District Council of Toronto and Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Pullano Carpentry, (Respondent). (*Withdrawn*).

**1632-85-M:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, (Applicant) v. May Tank & Pipe Co. Ltd., (Respondent). (*Granted*).

**1646-85-M:**Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Reinhardt Masonry Ltd., (Respondent). (*Withdrawn*).

**1656-85-M:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Industrial Commercial Insulation and Construction Sault Ltd., (Respondent). (*Withdrawn*).

**1657-85-M:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. MacLeod & Sons, (Respondent). (*Withdrawn*).

**1676-85-M:**International Union of Elevator Constructors, Local #50, Toronto, (Applicant) v. Canadian Escalator and Elevator Company, (Respondent). (*Granted*).

**1697-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, (Applicant) v. Ryan Mechanicals Ltd., The Metropolitan Plumbing and Heating Contractors Association, a Division of the Mechanical Contractors Association, Toronto, (Respondent). (*Withdrawn*).

**1709-85-M:**Construction Workers Local No. 52 affiliated with the Christian Labour Association of Canada, (Applicant) v. Mirmil Products Limited, (Respondent). (*Withdrawn*).

**1710-85-M:**Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bytown Woodworking & Display Inc., (Respondent). (*Granted*).

**1736-85-M:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, (Applicant) v. Spiers Industrial Limited, (Respondent). (*Withdrawn*).

**1752-85-M:**International Brotherhood of Electrical Workers Local Union 350 of the I.B.E.W. Construction Council of Ontario, (Applicant) v. B & B Enterprises (469946 Ontario Ltd.), (Respondent). (*Withdrawn*).

**1776-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. A. Valente Construction Company Limited, (Respondent). (*Withdrawn*).

**1779-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Code 1 Investments Inc., (Respondent). (*Withdrawn*).

**1780-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Starline Cement Finishing, (Respondent). (*Withdrawn*).

**1782-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Limited, (Respondent). (*Withdrawn*).

**1786-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Gamen Paving and Contracting Limited, (Respondent). (*Withdrawn*).

**1790-85-M:**Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Craighurst Construction Ltd., (Respondent). (*Withdrawn*).



**1803-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. J. Mazzuca and Son Construction Limited, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**0267-76-U:**Fred E. Baliskiy, (Complainant) v. Toronto Typographical Union, No. 91, (Respondent). (*Denied*).

**0213-84-OH:**Wilfrid George Love, (Complainant) v. Toronto Transit Commission, (Respondent Company) v. Amalgamated Transit Union, Local 113, (Respondent Union). (*Denied*).

**0490-85-R:**Wendell J. M. Sunega, (Applicant) v. United Steelworkers of America, (Respondent) v. Uddeholm Limited, (Intervener). (*Denied*).











*Ontario Labour Relations Board,  
400 University Avenue,  
Toronto, Ontario  
M7A 1V4*

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

December 1985



Ontario

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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1985] OLRB REP. DECEMBER**

**EDITOR: NIMAL V. DISSANAYAKE**

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**2973-84-R** Local 47 Sheet Metal Workers' International Association, Applicant, v. **Babco Plumbing Services Limited**, Babco Heating and Air Conditioning Division, Respondent

**Employee - Whether persons performing work for respondents independent contractors under sub-contract or employees paid on piecework basis**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

**APPEARANCES:** *B. Fishbein* and *R. Belleville* for the applicant; *Jacques A. Emond* for the respondent.

**DECISION OF THE BOARD;** December 18, 1985

1. The name of the respondent is amended to read: "Babco Plumbing Services Limited, Babco Heating and Air Conditioning Division".

2. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 629 of the Sheet Metal Workers' International Association.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. Having regard to the agreement of the parties, the Board further finds pursuant to section 144(1) of the Act that all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional



sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The parties were in dispute as to which employees were at work in the bargaining unit on the date of making of the application. Therefore, the Board authorized a Board Officer to inquire into and report to the Board on the list of employees filed by the respondent. The Board Officer conducted the inquiry and a copy of his report was sent to the parties. The Board subsequently listed the application for hearing in order to receive the submissions of the parties as to the conclusions the Board should reach based on the evidence in the Officer's report. The parties were in agreement at the conclusion of the Officer's inquiry that there was one employee, Andre Maillet, at work in the bargaining unit described above on the date of the application. They were in dispute whether two other persons, Roger Guitar and Georges Parent, were also at work on that date and were employees of the respondent. The respondent contended that they were not at work and that they were not employees of the respondent, rather they were independent contractors. The applicant took the contrary position on both points. By the time the matter came before the Board for hearing, respondent counsel acknowledged that the respondent had been unable to disprove that Guitar and Parent had performed work for the respondent on the date of the application.

7. They performed two jobs for the respondent over a period of four days. The first job was in Vanier and involved work on an underground heating system for a swimming pool. They completed their work in one day. The other job was referred to as the Kent Street job. It involved the installation of sheet metal ducting for a heating installation in a house which was being converted to an office and residence. That job was performed during the remaining three days, although there were times when Parent was not on the job. Both jobs involved labour only. All materials were supplied by the respondent.

8. Applicant counsel argues that, when the fourfold test enunciated in *R. v. The City of Montreal and Montreal Locomotive Works Limited*, (1947) 1 D.L.R. 161, is applied to the facts derived from the evidence in this case, it establishes Guitar and Parent as employees of the respondent and not independent contractors. Furthermore, the facts respecting the relationship between the respondent, Guitar and Parent, make this case indistinguishable from the Board's decisions in *Baron Dry Wall Ltd.*, 65 CLLC 16,029; *Dearie & Warren Limited*, [1970] OLRB Rep. Nov. 816; *Mo-Mek Systems Ltd.*, [1974] OLRB Rep. Oct. 642; and, *Mr. Seamless Eavestroughing Thunder Bay Limited*, [1974] OLRB Rep. Dec. 875. In all four cases, the Board applied the fourfold test and found the persons at issue to be employees and not independent contractors. The method of payment in evidence in all four cases was for an amount of money per unit of work. For example, in *Baron*, it was a rate per 1000 square feet; in *Dearie* and *Mo-Mek*, it was a predetermined price per unit installed; and in *Mr. Seamless*, it was a predetermined price per 1000 square feet. In all four cases, the Board found that the method of payment to be a piecework form of incentive rate. It also found that these prices were not prices on which the persons performing the work had a chance of making a profit or took a risk of making a loss, in the sense of those two factors of the fourfold test. To put it another way, the Board found that the persons at issue were piece workers and not independent contractors.

9. Counsel for the respondent contends that the instant case is readily distinguishable

from the four decisions on which applicant counsel relies, particularly when the conditions under which Guitar and Parent were engaged to perform work for the respondent are compared with the conditions under which Maillet, an acknowledged employee, is engaged. He has scheduled hours of work, including specific starting and quitting times; reports to the shop instead of the job and uses the respondent's vehicles for transportation to job sites; uses the respondent's equipment and tools, other than the tools which a sheet metal worker traditionally supplies himself; is paid at an hourly wage for work performed and receives overtime when he works beyond his normal quitting time; all of the normal deductions for income tax, unemployment insurance and Canada Pension Plan are made from his pay by the respondent; and, there is a history of an on-going employment relationship between him and the respondent. By contrast, Guitar and Parent were engaged on vastly different terms. The price per job of work was negotiated between Parent and the respondent. They were paid for the work by single cheque issued to Parent for the sum of the agreed prices. The only deduction from the payment was for a Workers' Compensation assessment, they supplied their own tools and were responsible for their own transportation directly to the job. Guitar and Parent have a history of working together, receiving payment in the form of a single cheque issued to one or the other of them and splitting the payment on a previously agreed share. Parent, who is a journeymen sheet metal worker usually receiving a larger share than Guitar, who is an apprentice. When the prices were negotiated for the jobs, Parent said he would have refused them had they been unsatisfactory.

10. The Board does not find that contrasting the terms under which Maillet has been engaged with those under which Guitar and Parent were engaged to perform work for the respondent to be probative of an independent contractor relationship between the respondent and Guitar and Parent. The fact that they were paid on a different basis than Maillet, chose their own hours of work and had no scheduled starting and quitting time may simply be a reflection of the different kind of working conditions which may exist when they are not determined by collective bargaining. The refusing of an unsatisfactory price is no different than the refusing of an unsatisfactory wage. The fact that Guitar and Parent only worked for the respondent for four days is not unusual in the construction industry and is of no assistance in deciding whether the work relationship is one of an employer/employee relationship or an independent contractor relationship. There is no difference in the kind of tools which the three persons supply, they are the hand tools common to a sheet metal worker. While Maillet drives the respondent's truck instead of his own vehicle to go from the shop to job sites, the respondent performs jobs on a supply and install basis, so it may be inferred that a truck is needed to carry supplies and materials to the job sites. Whereas Guitar and Parent were supplying labour only and Parent's truck was used simply for their personal transportation to the jobs. There is no conclusive evidence that Maillet always reports to the shop instead of going directly to the job. Some of these differences might be confirmatory of an independent contractor relationship when other factors do not point conclusively in one direction or another, but the Board does not find them conclusive of the existence of an independent contractor relationship between the respondent and Guitar and Parent.

11. Respondent counsel emphasized also the fact that the price for the two jobs performed by Guitar and Parent had not been predetermined by the respondent, as was the situation in the four cases on which applicant counsel is relying. Rather, they were negotiated with Parent who testified that, had he not liked the prices, he simply would have walked away from the jobs. The agreed price for the Vanier job was a lump sum amount. The Kent Street job ended up being paid as a lump sum amount, but Guitar and Parent began the job on the

basis of a unit price of \$7.00 per run of ducting and \$5.00 per fitting. Part way through the job, Parent ran into a problem with some joists in the way of the runs. He and Guitar did not have to remove the joists because the respondent arranged for a carpenter who was on the job to do that. By then, however, Parent knew that there was more work to the job than he had calculated and asked for a higher price. As a result, the respondent agreed to pay a little more than what the price per run and fitting would yield. When the job was finished, the respondent paid a lump sum greater than what would have been yielded under the original terms. Guitar and Parent also ran into a problem on the Vanier job. They encountered an obstruction which they and the respondent had not foreseen. In order to help them out, the respondent loaned them a shovel and a set of cutting torches in order to remove the obstacle.

12. Even if the Board were to agree with respondent counsel that Parent had negotiated a single price for each job, it could not be construed on the facts herein as being a fixed price typical of a true sub-contracting relationship. Nor could it be construed as a price on which there was a chance of profit, or to be more to the point, a risk of loss. The more usual arrangement in a sub-contracting relationship is for the sub-contractor to agree to do a job for a specific price, whether or not the price is arrived at as a result of competitive bidding. After the price has been set, if the sub-contractor is asked to do extra work, a specific price is usually negotiated for the extras. The evidence is clear in this case that it was not extra work which Guitar and Parent were asked to do. On the Vanier job, they encountered an unforeseen obstruction. On the Kent job, it was Parent's own evidence that he had misjudged the amount of work to be done. Normally when a sub-contractor encounters these kinds of circumstances, he is responsible for dealing with them at his own cost. That did not happen here. The respondent supplied Guitar and Parent with the tools needed to help them out of their dilemma on the Vanier job. On the Kent job, Parent asked for a higher payment and received it. There is no "risk of loss" in those kinds of arrangements. Therefore, even if the Board were to find that the manner in which the price was set for the jobs herein was different than the fact situations in the four cases cited by applicant counsel, the difference would still not establish Guitar and Parent as risk takers in the profit and loss sense of the fourfold test.

13. The fact that Guitar and Parent were paid by a single cheque issued to Parent is not determinative of an arms length, contractor/sub-contractor relationship between the respondent and Parent. While the evidence supports a conclusion that the respondent thought it was only dealing with Parent, there is no evidence to support a conclusion that Guitar's relationship with the respondent was any different than that of Parent, except for the fact that payment was made to Parent. Parent and Guitar have worked as a team before, although not for the respondent, and some times they are paid by cheque issued to Parent and other times by cheque issued to Guitar. There is no evidence that one is the employer of the other, rather the evidence points more to the fact that they work as a journeyman and apprentice team. The respondent was aware of Guitar's presence and in fact testified that he thought Guitar was Parent's employee. There is no evidence, however, that they are in an employer/employee relationship. To the contrary the evidence supports the conclusion that they work as a team whenever either one of them can find jobs for them to do, either as extra work when they are employed at an hourly wage by a contractor, or as a substitute for that kind of employment. Consequently, the Board is satisfied that when the respondent entered into an arrangement with Parent to perform the Vanier and Kent Street jobs, it was in fact entering into an arrangement with both Parent and Guitar to do that work.

14. In the result, the Board finds very little on which to distinguish the instant case



from the Board's decisions in *Baron Dry Wall*; *Dearie & Warren*; *Mo-Mek Systems* and *Mr. Seamless Eavestroughing*, *supra*. For the same reasons given by the Board in those decisions, the Board finds that Roger Guitar and Georges Parent are employees of the respondent who were paid on a piecework basis for the work which they performed for the respondent at the times material to this application.

15. The Board finds, therefore, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 14, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

.... the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

17. Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

18. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**2780-84-U; 2781-84-U** Rudolph Williams, Complainant, v. **Belkin Toronto Paperboard Mill**, A Division of Belkin Packaging Ltd., Respondent, v. Canadian Union of Operating Engineers & General Workers, Intervener

Practice and Procedure - Unfair Labour Practice - Whether respondent permitted to move for non-suit at end of complainant's case without being put to election whether to call evidence - Complainant claiming dual allegiance of individual to management and union as basis for complaint - Individual entitled to notice - Adjournment granted to permit addition of individual as party and amendment of complaint

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

**APPEARANCES:** O. Mullerbeck for the applicant; Peter Thorup, Klem Wenske and Mickey Moyer for Belkin Toronto Paperboard Mill; Michael O'Malley for the Canadian Union of Operating Engineers and General Workers and its Local 101.

#### **DECISION OF THE BOARD;** December 2, 1985

1. The Board directs that these complaints be and the same are hereby consolidated.
2. These matters came before this panel for hearing on November 12, 1985. At the outset, counsel for Belkin Toronto Paper Board Mill, A Division of Belkin Packaging Ltd. (hereinafter referred to as Belkin) raised the fact that it was maintaining its position as set out in the reply, i.e., it intended to ask the Board to dismiss the complaint for failing to disclose a *prima facie* case or, in the alternative, it was asking the Board to exercise its discretion to dismiss the complaint by reason of the complainant's delay in filing the complaint. However, counsel for Belkin added that in the interest of expedience and practicality, his client was prepared to refrain from making the preliminary objections at the outset of the case. Instead, it was suggested that the complainant be allowed to present his evidence and be subject to cross-examination. At the end of the complainant's case, counsel for Belkin asked that it be then allowed to make preliminary motions to dismiss the case for reasons of delay and/or on the basis that no *prima facie* case had been made out. It was made clear that this procedure would be different than the normal procedure used in a motion for a non-suit. Counsel for the Canadian Union of Operating Engineers & General Workers (hereinafter referred to as the Union) joined in the suggestion and request made by counsel for Belkin. Counsel for the complainant opposed the request, arguing that Belkin and the Union ought to be put to the same election as would normally be required in a motion for a non-suit.
3. Given the seriousness of the concerns raised by the preliminary objections and the desire to expedite the process, the Board ruled that Belkin and the Union would be permitted to raise their preliminary motion and renew or present the motion to dismiss on the basis of delay at the end of the complainant's case. This would be allowed without putting Belkin or the Union to the normal election as to whether to call evidence. Should the motions fail, the Board would proceed to hear any evidence which Belkin or the Union chose to present.
4. After resolving this preliminary matter, counsel for the complainant then made an opening statement. In the course of the opening statement, it was made clear that the basis

of the complainant's case rests on the allegation that one individual, namely Al Tanner, held both the managerial function of Chief Operating Engineer and the Union position of Shop Steward and representative for the bargaining unit for Local 101 of the Union. This alleged "dual allegiance" was said to undermine the basic requirement of an arm's length relationship between management and labour. This resulted in two types of alleged violations of the Act. First, it was submitted that it resulted in the individual complainant being denied the duty of fair representation by the Union contrary to section 68. Second, the situation of Mr. Tanner was said to have created conflicting allegiances which resulted in the violation of section 64 of the Act.

5. The Board raised concern over what relief could be granted to the complainant in these circumstances. In particular, the Board pointed out to counsel for the complainant that Mr. Tanner had not been named as a party. It was clear from counsel for the complainant's opening statement that the relief requested from the Board would be a declaration that Mr. Tanner is not a member of the bargaining unit or not an employee within the meaning of the Act or, as set out in the application itself, that Mr. Tanner "be removed and barred from the bargaining unit."

6. In discussion of the preliminary matters with counsel for the parties, the Board had indicated to the parties its concern over the nature of the relief requested and the non-inclusion of Mr. Tanner as a party. The Board had given counsel for the complainant the option of proceeding forward with the hearing without adding Mr. Tanner as a party and indicated that this may well limit the nature of the relief available to the complainant. In the alternative, the complainant was offered the option of seeking an adjournment in order to have Mr. Tanner named as a party. Initially, counsel for the complainant indicated that the complainant was prepared to proceed without Mr. Tanner being added as a party. However, later on in the proceedings, when the opening statement had been concluded, and it became apparent that the complainant did want a resolution of Mr. Tanner's status vis-a-vis the bargaining unit, the Board raised the question of notice to Mr. Tanner yet again. At this point, counsel for the complainant changed his position and requested that an adjournment be granted to allow Mr. Tanner to be added as a party.

7. Counsel for the Union and for Belkin strenuously opposed the adjournment. They pointed out that this hearing day was the third appearance before the Board for the parties in this matter. The first day of proceedings had been occupied by procedural matters which resulted in an order requiring particulars to be delivered by the complainant. The second day of proceedings was thwarted because of the illness of counsel for the complainant resulting in an adjournment. Counsel for the Union and the company stressed that the matters which are the subject of the complaints stretch over a long period of time, dating back as far as 1982, and that any further delay ought not to be allowed, especially given the fact that it arose because of the incorrect framing of the action.

8. As stated earlier, there are two fundamental aspects to this case. One involves the complainant's individual allegations of unfair representation and violations of the Act that arose because of the way he was treated by the Company and the Union. The other aspect of the case involves the serious allegations of conflicting allegiances of Mr. Tanner as a result of him purportedly holding Union office or being a member of the Union and also being a member of management. The relief sought as a result of Mr. Tanner's alleged dual role would affect him directly. To hear the case and be prevented from inquiring into and exploring the

possibility of relief against Mr. Tanner would ignore one fundamental aspect of the complaint. The Board does not feel that it would be in the interest of labour relations to resolve only one aspect of this case. Further, we do not see that it would be in the parties' interests to only have one aspect of the case resolved. Even if we were to set aside the question of purported conflicting of allegiances in Mr. Tanner, the fundamental problem which gave rise to the rest of the case would still remain and the parties would be left without assistance in their future dealings.

9. Without in any way deciding whether this Board has jurisdiction to grant any of the relief requested by the complainant with regard to Mr. Tanner or his position, it would be a denial of fundamental principles to proceed in the absence of Mr. Tanner as a party. It is clear from the relief that the complainant seeks that the Board will be asked to make a remedial order that will effectively bar Mr. Tanner from the bargaining unit. If his rights within the bargaining unit or his rights as an employee within the meaning of the *Labour Relations Act* are effected, he is, as a matter of fundamental justice, entitled to notice of these proceedings and to be considered as a party to these proceedings. Thus, the Board was not prepared to proceed with the matter without having Mr. Tanner added as a party.

10. Despite the Board's very grave concerns about the delay and expense that an adjournment would cause and the Board's sincere regret that Mr. Tanner had not been added earlier in the proceedings as a party, the Board did orally grant an adjournment of the proceedings to ensure that a full and proper hearing of the matter would ultimately be held.

11. In the result then, the matter was adjourned to enable the complainant to add Mr. Al Tanner as a party to these proceedings. The complainant is given one week after the release of this order to file an amended complaint, and amended particulars if necessary, with Mr. Tanner added as a party. The matter is referred to the Registrar for the rescheduling of the hearing at the earliest possible convenience to the parties. This panel is not seized with the matter.

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**1575-85-R** International Union of Operating Engineers, Local 793, Applicant, v. **Bruno's Contracting (Thunder Bay) Limited**, Respondent, v. Group of Employees, Objectors

**Bargaining Unit - Construction Industry - Certification application under s.144 seeking unit comprising of applicant's traditional craft in all sectors and truck drivers and labourers not within its craft in all sectors other than ICI - Whether "all other employees" in s.144(1) including persons outside applicants craft - Unit held not appropriate**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

**APPEARANCES:** *S. B. D. Wahl* and *P. Malley* for the applicant; *Robert D. Weiler, Q.C.* and *Silvio DiGregorio* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD;** December 2, 1985

1. The name of the respondent is amended to read: "Bruno's Contracting (Thunder Bay) Limited".

2. This is an application for certification made under the construction industry provisions of the *Labour Relations Act*.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

4. The parties had agreed on the description of the appropriate bargaining unit in this case. The Board questioned the parties as to their agreement and received their submissions as to whether the unit agreed to was appropriate for collective bargaining. Following those submissions, the Board recessed and when the hearing resumed, delivered the following oral ruling:

The applicant seeks certification under the construction industry provisions of the Act for a bargaining unit comprised of persons who come within the applicant's traditional craft unit in all sectors of the construction industry and of truck drivers and labourers in all sectors of the construction industry except the industrial, commercial and institutional sector who are not part of the applicant's traditional craft unit.

This application for certification relates to the industrial, commercial and institutional sector of the construction industry and was filed pursuant to section 144 of the *Labour Relations Act*. The unit the applicant and respondent agreed was appropriate for collective bargaining is described as follows:



“all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those engaged in survey work, save and except non-working foremen and those above the rank of non-working foreman in the Province of Ontario in the industrial, commercial and institutional sector of the construction industry, and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of the same, and those employees engaged in survey work *truck drivers and construction labourers*, save and except non-working foremen and those above the rank of non-working foreman in the District of Thunder Bay, (Ontario Labour Relations Board Geographic Area 22) save and except for the industrial, commercial and institutional sector of the construction industry.”

[emphasis added]

Subsections 144(1) and (3) of the Act provides as follows:

(1) “An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117 (e) shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

(3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.”

Section 144(1) requires the Board to find one appropriate bargaining unit that is comprised of both employees who would be bound by a provincial agreement together with all other employees in at least one other geographic area unless the other employees are already represented in collective bargaining at the time of the application. The applicant in this case submits that “all other employees” referred to in section 144(1) may include persons who would not ordinarily be part of the applicant’s traditional craft unit. Counsel submits that the applicant could obtain certification for such a unit under section 144(3). Therefore, counsel submits the Board should find that such a unit would be appropriate for collective bargaining under section 144(1).

A similar argument was made and was rejected by the Board in *Aero Block and Precast Limited*, [1984] OLRB Rep. Sept. 1166. In our view, subsection 144(1) of the Act must be interpreted so as to avoid the necessity of making sectoral determinations in applications for certification made under that subsection. Sectoral determinations are

clearly avoided in subsection 144(1) applications where the applicant that is an affiliated bargaining agent seeks to represent employees in the craft bargaining units that it traditionally represents. Where the applicant is an affiliated bargaining agent and seeks to represent employees outside of the industrial, commercial and institutional sector that are not within its traditional craft bargaining unit, the Board may well be required to make sectoral determinations. We are satisfied, as was the Board in *Aero Block and Precast Limited*, that an affiliated bargaining agent may make such an application under subsection 144(3) of the Act, and the description of the appropriate bargaining unit that it seeks to represent would be determined in accordance with the principles used by the Board under section 6(1) of the Act. See *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734; Practice Note No. 11; and *Aero Block and Precast Limited*, *supra*.

For these reasons, we are satisfied that the agreed-upon bargaining unit is not appropriate for collective bargaining. Rather, we find that there are two appropriate bargaining units in this case, one unit described in terms of the applicant's traditional craft bargaining unit, pursuant to section 144(1) and a second unit of all other unrepresented trades at work on the date of application, that is, construction labourers and truck drivers. In this case, since the parties agreed that the respondent's employees were working in road building only on the date of the application, the Board is satisfied that the employees the applicant seeks to represent pursuant to section 144(3) of the Act were employed in sectors other than the industrial, commercial and institutional sector on the application date, and that such a bargaining unit is appropriate for collective bargaining.

5. Following the Board's oral ruling, the Board advised the parties of the lists of employees in each unit and the number of those employees who were members of the applicant at the relevant times.

6. Having regard to the foregoing, and pursuant to section 144(1) of the Act, the Board further finds that all employees of the respondent in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those employees engaged in survey work, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).

7. The Board further finds, pursuant to sections 6(1) and 144(3) of the Act, that all construction labourers and truck drivers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

8. The Board, on agreement of the parties, finds that there were 32 employees in bargaining unit #1 and 46 employees in bargaining unit #2 on the date of application. The applicant filed membership evidence on behalf of 18 of the employees in bargaining unit #1 and 29 employees in bargaining unit #2. Therefore, having regard to the foregoing, the Board further finds that more than fifty-five per cent of the employees of the respondent in each bargaining unit, at the time the application was made, were members of the applicant on October 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. Although timely statements of desire in opposition to the applicant were filed with the Board, no one appeared on behalf of any signatory to those statements. Therefore, as there was no evidence relating to the voluntariness of the statements, the Board gives them no weight in considering the matter before us.

10. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate in relation to the bargaining unit described in section 144(1) if the applicant has the requisite membership support:

...., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, based on our determination in paragraph 8 and pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those employees engaged in survey work, save and except non-working foremen and persons above the rank of non-working foreman.

11. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all employees of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and those employees engaged in survey work, save and except non-working foremen and persons above the rank of non-working foreman.

12. Further, having regard to our determination in paragraphs 7 and 8, a certificate will issue to the applicant trade union in respect of all construction labourers and truck drivers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**0197-85-R** International Union of Operating Engineers, Local 793, Applicant, v. **Commonwealth Construction Company**, a division of Guy F. Atkinson Holdings Ltd., Respondent, v. United Brotherhood of Carpenters and Joiners of America Local Union 1669, Intervener

**Bargaining Unit - Certification - Construction Industry - Whether applicant union required to satisfy craft conditions in s.6(3) where requirements of s.144(1) met - Whether employee bargaining agency represents surveyors - Whether s.144(1) permitting application with respect to employees for whom no bargaining rights held but who would be covered by provincial agreement even if union holds bargaining rights for employees covered by same agreement**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

**DECISION OF THE BOARD;** December 3, 1985

1. The Board, by decision dated September 11, 1985, dismissed this application for certification after the applicant had requested leave to withdraw it. The Board had conducted a hearing into this matter on June 28, 1985, following which it issued a decision dated July 5, 1985, appointing a Labour Relations Officer. That decision stated:

“During the course of the hearing of this matter, the Board dealt with preliminary motions made by counsel for the respondent, and counsel for the intervener. Following the oral disposition of those motions, counsel for the applicant advised the Board that the applicant was challenging the list of employees filed.”

2. Counsel for the applicant, by letter dated November 25, 1985 requested that the Board issue written reasons for the dispositions it made of the motions made during the hearing of June 28, 1985.

3. These are the reasons for its determinations made during the course of that hearing.

4. The applicant filed an application for certification for the following bargaining unit:

“all employees engaged as surveyors:

- (i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario;
- (ii) in all other sectors of the construction industry in OLRB Geographic Areas 23 and 24,

save and except non-working foremen and persons above the rank of non-working foreman.

CLARITY NOTE:

The proposed bargaining unit includes instrument men, rod men, chain men and party chiefs, save and except field engineers and persons above the rank of field engineer.”



5. Counsel for the respondent submitted that the unit applied for was not appropriate for collective bargaining. Following the submissions of the parties, the Board recessed and returned to deliver the following oral ruling:

The respondent submits that the unit applied for is inappropriate because the applicant would not be entitled to a "craft unit" finding under section 6(3) of the Act in respect of the employees it seeks to represent in this application, and further, that the provincial agreement, by which the applicant is bound, does not apply to surveyors employed outside of the Sarnia area because there is no wage schedule for them when they work outside of that area. Counsel submits that the criteria set out in section 6(3) must be met even if the applicant is permitted to bring the application under section 144(1) of the Act.

In our view, if the applicant can meet the requirements of section 144(1) of the Act, then section 6(3) of the Act does not have any relevance to the matter. The application before us relates to the industrial, commercial and institutional sector and is filed by an affiliated bargaining agent. Furthermore, the parties agreed that the ministerial designation applicable to the applicant applies to surveyors. Therefore, pursuant to section 139(1), the employee bargaining agency to which the applicant is affiliated represents surveyors.

The express language of Schedule O to the provincial collective agreement by which the applicant is bound indicates that the provincial agreement applies to surveyors. This is consistent with the designation and is also what was contemplated by the designation order made by the Minister pursuant to section 139(1) of the Act.

Without determining whether there are any wage rates applicable to surveyors outside of the Sarnia area under that collective agreement, even assuming that such wage rates do not exist, does not detract from the fact that the agreement does explicitly cover surveyors and that it is open to the employee bargaining agency to which the applicant is affiliated to bargain those rates on behalf of the surveyors it represents.

Therefore, the respondent's preliminary motions are dismissed.

6. Following that ruling, counsel for the intervener submitted that the applicant could not apply for certification for a unit comprised of surveyors since the applicant already held bargaining rights for all of the other classifications covered by the applicant's provincial agreement that is binding on the respondent. Following the submissions of the parties, the Board recessed and returned to deliver the following oral ruling:

The intervener objects to the bargaining unit applied for by the

applicant on the basis that under section 144(1) of the Act, the unit applied for must relate to "all employees who would be bound by a provincial agreement." In this case, the parties agreed that the applicant holds bargaining rights for certain employees of the respondent in the industrial, commercial and institutional sector, but that those bargaining rights do not extend to surveyors employed by the respondent.

While the applicant's bargaining rights do not cover surveyors employed by the respondent, the provincial agreement, by which the applicant is bound and the designation order issued by the Minister under section 139(1) of the Act do relate to surveyors, although there is no explicit wage schedule in the provincial agreement applicable to surveyors employed outside of the Sarnia area. The intervener argues that since the applicant already holds bargaining rights for some of the employees of the respondent, who is bound by the provincial agreement to which the applicant is bound, the applicant cannot now seek certification for those employees who would be bound by the provincial agreement for whom the applicant does not now hold bargaining rights.

The Board addressed a similar argument in the *Georgian Building Corporation*, [1981] OLRB Rep. March 275 where the Board stated at page 283:

... the Board cannot accept the construction of the section 131a [now 144] advocated by counsel for the respondent. Harmonious relations between employers and employees would not be furthered, nor would the practice and procedure of collective bargaining be encouraged by that construction which would preclude certification in respect of some employees who would not otherwise be beyond the purview of the certification procedures under the Act. Such an interpretation might well result in a resurgence of recognition strikes, the elimination of which is one of the purposes of the certification procedures of the Act. The Board has a well-known and long standing practice of preserving existing bargaining rights by excluding from bargaining units employees covered by subsisting collective agreements. In the absence of a clear and specific legislative direction to the contrary, the Board is of the view that it is appropriate, having regard to the preamble and the general scheme of the Act, to maintain that practice which promotes industrial peace and stability by recognizing and preserving existing bargaining rights. (Employees covered by subsisting Board certificates and subsisting written voluntary recognition agreements should also be excluded to preserve any such additional bargaining rights which might be in existence.)"

In our view, section 144(1) does permit the applicant to now apply to represent employees for whom it does not have bargaining rights who would be bound by the provincial agreement notwithstanding that the applicant already holds bargaining rights for employees who are already bound by the same provincial agreement. Thus, the within motion is dismissed.

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**1296-82-U; 0195-83-U Luciano D'Alessandro and Donato Marinaro, Complainants, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents**

**Duty of Fair Referral - Unfair Labour Practice - Board finding hiring hall records altered to mislead Board rendering records unreliable - Union not calling evidence to explain prima facie arbitrary and anomalous referrals - Board finding some referrals challenged unlawful - Whether referrals made "pursuant to a collective agreement" - Reverse onus applying only to employers and employers organizations - Request for award of costs denied**

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *F. W. Murray* and *W. F. Rutherford*.

**APPEARANCES:** *Ed J. Brogden* for the complainants; *A. M. Minsky*, *R. D'Andrea* and *D. D'Andrea* for the respondents.

**DECISION OF THE BOARD;** December 11, 1985

1. File No. 1296-82-U is a complaint under section 89 of the *Labour Relations Act* in which Luciano D'Alessandro alleges that he has been dealt with by the respondents contrary to section 69 of the Act. (The complaint as originally filed also alleged a breach of section 68 of the Act, but that allegation was withdrawn on February 2, 1984 by Mary F. Portis, who was at that time Mr. D'Alessandro's counsel.) File No. 0195-83-U is a section 89 complaint in which Donato Marinaro alleges that he has been dealt with by the respondents contrary to sections 69 and 70 of the Act. Those two complaints were consolidated by the Board on August 18, 1983, along with four other section 89 complaints which are no longer before the Board. (The respondent Labourers' International Union of North America, Local 1089, is also referred to in this decision as the "Union" and the "Local".) The respondent Rocco D'Andrea was the Business Manager of the Union from 1965 until June of 1985. It is his actions (and those of fellow Union officials) which are the focus of these complaints.

2. Mr. Marinaro's complaint, which was filed with the Board on April 28, 1983, originally impugned 46 referrals that allegedly occurred between July of 1981 and September of 1982. By letter delivered to the Board on July 4, 1983, Brian Iler, who at that time was counsel for Mr. Marinaro, filed, as an additional particular to that complaint, an allegation pertaining to a March 1, 1983 referral. On October 11, 1983, Diane L. Haskett, who by that time had replaced Mr. Iler as Mr. Marinaro's counsel, filed further particulars, impugning seven referrals alleged to have occurred in March and April of 1983, and also alleging that Mr. Marinaro was laid off by D. W. Rankin Limited on July 7, 1981 at the direction of the respondent Rocco D'Andrea, who was the Local's Business Manager at all material times.

3. On October 17, 18, and 19, 1983, on the agreement of the parties, the Board heard as a preliminary matter the evidence and submissions of the parties concerning Mr. Marinaro's delay in filing those allegations. In a decision dated October 31, 1983 (reported in [1983] OLRB Rep. Oct. 1699), the Board wrote, in part, as follows concerning that matter:

12. .... Having regard to all the evidence and the submissions of the parties, we are satisfied that if Mr. Marinaro had proceeded with due diligence after the hiring hall records



became accessible to him, he would have filed his section 89 complaint (concerning the aforementioned 46 referrals) by the end of February of 1983, if not before. However, his delay in filing has not been so extreme as to make it appropriate for the Board, in the circumstances of this case, to decline to hear his complaint on the merits.

13. ... we are satisfied that any prejudice to the respondents which Mr. Marinaro's delay may have occasioned can be adequately dealt with by the Board in the exercise of its remedial discretion under section 89 of the Act in determining the amount of compensation, if any, to be paid to Mr. Marinaro by the respondents. Similar considerations apply to the delay by Mr. Marinaro (or by Mr. Iler, who was then his legal counsel) in filing, by letter dated July 4, 1983, the additional particular to the complaint in respect of a referral which allegedly occurred on March 1, 1983.

14. While there has been several months of undue delay on the part of Mr. Marinaro (or his agent, Mr. Iler) in failing to file or cause to be filed, prior to October 11, 1983, the allegations contained in paragraph 3(D) of his "further particulars", which allegations pertain to seven referrals that allegedly occurred in March and April of 1983, we are satisfied that any prejudice to the respondents which may have been caused by such delay can also be adequately dealt with by the Board in assessing any compensation which might be awarded in respect of those referrals.

15. Paragraph 3(E) of the "further particulars" filed on October 11, 1983 alleges that Mr. Marinaro was laid off from work at D. W. Rankin Limited on July 7, 1981, without justification, at the direction of Mr. D'Andrea. Although that subparagraph pertains to an event which allegedly occurred 27 months prior to the filing of that allegation with the Board, we are satisfied that the information which led to its filing first came to the attention of Mr. Marinaro in late July or early August of 1983 when Clemente Cicchini, a member of the Executive Board of Local 1089, revealed to Mr. Marinaro that Mr. D'Andrea had stated, in the presence of Mr. Cicchini and some other Executive Board members, that after the aforementioned Executive Board election, Mr. Marinaro and the others who were opposing them in the election would have to be laid off any job that they came to. (It is unnecessary at this stage in the proceedings to make any finding as to whether or not Mr. D'Andrea actually made that statement. It is sufficient to find that Mr. Cicchini told Mr. Marinaro that Mr. D'Andrea did so, and that Mr. Marinaro, in reliance upon that information, instructed his counsel to add to the complaint the allegation which ultimately became paragraph 3(E) of the further particulars.) Nor can it be said that Mr. Marinaro should have been aware of the information which gave rise to that allegation prior to late July or early August of 1983. Although Mr. Marinaro had earlier approached Mr. Cicchini in an attempt to obtain information which might assist him in his quest for hiring hall justice, Mr. Cicchini did not divulge that information at that time. We find no merit in Mr. Minsky's submission that Mr. Marinaro should have filed a section 89 complaint at that time on the basis of unconfirmed suspicions which he harboured (but, not unreasonably, felt incapable of proving). Moreover, we note that unlike Mr. Marinaro's other allegations, his paragraph 3(E) allegation does not pertain to one of many referrals, but rather to an extraordinary event which, if it occurred, would almost certainly be within Mr. D'Andrea's recollection. Thus, while there has been some undue delay on the part of Mr. Marinaro (or his agent, Mr. Iler) in failing to file the allegation contained in paragraph 3(E) prior to October 11, 1983, that period of delay (between August and October of 1983) is not so extreme as to prompt the Board to decline to hear that serious allegation. Therefore, having regard to all the circumstances, we are satisfied that any prejudice which that delay may cause to the respondents can be adequately dealt with by the Board in the exercise of our remedial discretion under section 89 in determining the amount of compensation, if any, to be awarded to Mr. Marinaro in the event that he succeeds in proving that allegation.

4. By letter dated January 24, 1984, Mary Portis, who was at that time counsel for Mr. D'Alessandro, advised the Board of her intention "to move prior to the hearing ... that the reverse onus of the *Labour Relations Act* applies to the ... complaints". On January 31, 1984, after hearing the submissions of Ms. Portis and Ms. Haskett concerning that matter, the Board made the following unanimous oral ruling:



It will not be necessary to call upon Mr. Minsky on this issue. Section 89(5) is expressly confined to employers and employers' organizations. We are not persuaded that a trade union such as the respondent becomes an employer or an employers' organization when it refers persons to employment pursuant to a collective agreement which it enters into with an employer or an employers' organization. We are not unmindful of the difficulties of proof which a complainant may encounter in proceedings such as the present case. However, if the reverse onus is to be made applicable to sections 68 and 69 of the Act, that will require a legislative amendment and cannot legitimately be accomplished by this Board straining beyond the breaking point the definition of "employer".

5. The Board then heard the submissions of the parties concerning the extent, if any, to which the Board could rely in these proceedings on the findings of fact contained in the decisions of the Board, differently constituted, in the *Joe Portiss* case (File No. 1278-82-U). The unanimous oral ruling given by the Board on February 1, 1984 in respect of that issue was subsequently provided to the parties in writing, as part of a decision dated June 6, 1984 (reported in [1984] OLRB Rep. June 798). Paragraph 2 of that decision reads:

In a decision dated July 11, 1983 in File No. 1278-82-U (reported in [1983] OLRB Rep. July 1160), another panel of the Board found that the respondent trade union (also referred to in this decision as "Local 1089") had engaged in arbitrary and discriminatory referrals to employment and designations to employment in the administration of its hiring hall contrary to section 69 of the Act, and made an extensive order to remedy the situation. That complaint was brought by Joe Portiss, who is serving as an advisor to complainants' counsel in the instant case. On January 31, 1984, the present panel of the Board heard submissions of the parties concerning the extent to which we could rely in the instant proceedings on the findings made in the *Portiss* case. On February 1, 1984, the Board made the following oral ruling (which counsel for the respondents requested the Board to provide in the form of a written decision):

Having carefully considered the submissions of the parties, we are not prepared to adopt, without proper proof before this panel, the findings of fact contained in the decisions of the Board, differently constituted, in the *Joe Portiss* case (File No. 1278-82-U). With respect to the extent to which the Board can rely upon findings made in an earlier decision, see generally *Radio Shack*, [1979] OLRB Rep. March 248; *Re Tandy Electronics Ltd.*, [1979] OLRB Rep. 26 O.R. (2d) 68 (Div. Ct.); *Napev Construction Limited*, [1980] OLRB Rep. June 862; and *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501.

The present complainants were not parties to the *Portiss* complaint, nor were they privies to any of those parties. Thus, if Mr. Portiss's complaint had been dismissed, they would not have been precluded from filing the present complaints by the concept of *res judicata*, issue estoppel, or any analogous legal principle. Moreover, the issue before the Board in the *Portiss* case was whether the respondent trade union contravened section 69 of the Act by acting arbitrarily, discriminatorily or in bad faith in the selection, referral, assignment or scheduling of Mr. Portiss to employment. The issue in the present case is whether the respondent trade union has acted arbitrarily, discriminatorily or in bad faith in the selection, referral, assignment, designation or scheduling of Donato Marinaro and Luciano D'Alessandro to employment. Although the Board awarded extensive relief to remedy the hiring hall abuses which it found in that case, we do not view that decision as being a decision *in rem* which is binding as against any and all future parties. The respondents elected to call no evidence in respect of the complaint by Joe Portiss. However, they are entitled by the rules of natural justice and by section 102(13) of the Act to present evidence and make submissions in respect of the present consolidated complaints if they wish to do so. As indicated in our earlier ruling in which we found the section 89(5) "reverse onus" to be inapplicable in the present case, the onus is on the complainants to duly prove their complaints on the balance of probabilities. The fact that another member of their union succeeded in proving his complaint and obtained

monetary and other relief from the Board does not assist the present complainants, although the existence of the broad remedial order made in that case is a matter of public record and can be taken into account in the present case in determining the appropriate remedy to be granted to the complainants if their case succeeds. Similarly, the method of calculation of damages set forth in that panel's decision dated September 30, 1983 (reported in [1983] OLRB Rep. Sept. 1554) may well be of assistance to the present panel if it becomes necessary to quantify damages, since we would be unlikely to deviate from that approach unless we were satisfied that the approach adopted in that case is inappropriate in the circumstances of the present case. Thus, the existence of the *Portis* decisions is by no means irrelevant to the present proceedings. However, for the aforementioned reasons, we are not prepared to accede to the complainants' request that we adopt and apply the findings of fact contained in those decisions.

We are very concerned, however, about the potential length of the present proceedings, and the associated costs to the parties and to the Board. Accordingly, we strongly urge counsel to meet and attempt to agree upon as many pertinent facts as possible so as to narrow and define the factual issues in dispute between the parties. It appears to us that it is in the interest of all of the parties to minimize as far as possible the number of days of hearing time required to litigate this case, so as to minimize legal and other costs associated with it and avoid unnecessarily protracted and costly litigation.

6. On February 1, 1984, the Board afforded Ms. Portis an opportunity to "show cause" why her client should be permitted to amend his complaint to include five further allegations, as set forth in her letter dated October 27, 1983 to the Board. After hearing evidence and argument concerning that matter, the Board made the following unanimous oral ruling on February 2, 1984:

The Board's general approach to delay in cases of this type is summarized in paragraph 5 of our October 31, 1983 decision in this matter. Having regard to that approach and to all the evidence and the submissions of the parties, we find that there has been unreasonable delay on the part of the complainant, Luciano D'Alessandro, in seeking to amend his complaint to include *some* of the further allegations which form the subject matter of this "show cause" motion. Our assessment and review of all the evidence has led us to conclude that Mr. D'Alessandro did not take reasonable steps in a timely manner to attempt to obtain access to the Union's hiring hall records prior to October of 1983. We have also concluded that by November 1, 1982, Mr. D'Alessandro had retained lawyer Wallace Lang in respect of this complaint, which was filed by Mr. D'Allesandro on October 13, 1982, and that Mr. D'Alessandro and his lawyer Mr. Lang knew or should have known by late November of 1982, if not earlier, that access to the Union's hiring hall records could have been obtained at or about that time by proceeding with Mr. D'Alessandro's complaint under section 69 of the Act. The prejudice which can result to a respondent in cases of delay in relation to alleged breaches of section 69 of the Act has already been described in paragraph 13 of our decision dated October 31, 1983 concerning these consolidated proceedings, and need not be repeated in this ruling. Although Mr. D'Alessandro's delay has not been so extreme as to prompt us to deny the requested amendments in their entirety, we are of the view that this is an appropriate case in which to decline to permit the amendments requested in numbered paragraphs 1 and 2 of Mr. Portis's letter dated October 27, 1983, and to indicate at this time that we will not award any compensation to Mr. D'Alessandro for the period preceding September of 1982. We will allow the other requested amendments, but will leave open for final argument the matter of whether compensation ought to be further restricted or reduced due to Mr. D'Alessandro's undue delay.

After the Board had made that ruling, Ms. Haskett advised the Board that Mr. Marinaro had decided to withdraw four of his allegations (namely, that Jeff Prozorowicz was unjustifiably sent to work ahead of him in July of 1981, that Frank Manola and Italo Laudino were unjustifiably sent to work ahead of him in February of 1982, and that Earl Brown was unjustifiably sent to work ahead of him in March of 1982.)

7. The hearing of the merits of these consolidated complaints commenced on February 2, 1984, and continued on April 10, 11, 12, May 1, 2, June 12, 13, July 26, and August 9, 1984. The hearing of the merits was interrupted on August 9, 1984 when the Board, on the agreement of the parties, proceeded to hear the evidence of the parties concerning the complainants' allegation (made through their counsel, Mr. Brogden) that Salvatore Gagliardi, one of the complainants' witnesses, had been "jumped" on the Union's out-of-work list (also referred to in this decision as the "list"), in an attempt to intimidate him. The hearing of the evidence concerning that allegation, in what was referred to by counsel as a "voir dire", commenced on August 9 and continued on August 10, 22, 23, and 24, 1984. The parties subsequently submitted written argument concerning the subject matter of that "voir dire". After carefully considering all of that evidence and the written submissions of the parties, the Board, in an unreported decision dated October 5, 1984, concluded that no attempt to intimidate Mr. Gagliardi had been established, and that Mr. Gagliardi had not been "jumped" on the list. Following the release of that decision, the hearing of the merits continued on October 16, 17, 18, 30, 31, November 28, 29, December 11, 12, and 13, 1984, and on February 7, 8, and March 20, 1985. On the agreement of the parties, the Board heard counsel for the complainants' argument in chief on March 30, 1985, and then received written argument from counsel for the respondents on April 18, 1985, and written reply argument from counsel for the complainants on April 29, 1985.

8. During the course of the protracted hearing of these consolidated matters, the Board heard oral evidence from over thirty witnesses and received more than one hundred exhibits. In making the findings of fact set forth in this decision, the Board has carefully considered all of that oral and documentary evidence, the oral and written submissions of counsel, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and what influences may reasonably be drawn from the totality of the evidence.

9. Before turning our attention to the numerous referrals that have been challenged in these proceedings, we will briefly consider the significance of union "hiring halls", and the Board's developing jurisprudence under section 69, which provides as follows:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

10. In commenting on the significance of union "hiring halls" and the potential for their abuse, the Board wrote, in part, as follows in *Joe Portiss*, [1983] OLRB Rep. July 1160:

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls In The Maritime Industry*, Sub-Committee on Labour Management Relations Of Senate Committee On Labour And Public Welfare, 81st Cong. (2d) ses. 100-01 (1950) and Bastress, "Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls" [1982] West Virginia Law Review 31). If they



are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvas numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.

8. To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and the classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system effectively vests in those union officers powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

9. The advantages of the hiring hall system and the potential for their abuse were well summarized by Professor Bastress in the following passage at page 31:

The union hiring hall has been one of the major developments in twentieth century labour relations. It has provided many industries with a means of efficiently matching unemployed workers with job vacancies and has replaced a system of haphazard, unjust, and corrupt employment practices. Yet it has also developed substantial problems of its own. A hiring hall is fraught with potential for abuse, and, indeed, that potential is all too frequently realized. The largely unreviewable discretion of union business agents and inadequate protection for workers can combine to make hiring halls a mixture of whim, nepotism, prejudice and irrationality.

10. Unfortunately Canadian labour relations have not been without some degree of abuse, albeit exceptional, in the hiring hall system. (See, Robert Cliche, Brian Mulroney, Guy Chevette, *Report of the Commission on the Exercise of Union Freedom in the Construction Industry*, Quebec, (1975); Waisberg, *Report of the Royal Commission on Certain Sectors of the Building Industry*, ("The Waisberg Report") Ontario, (1974) at pp. 326-28; see also the recent decision of the Supreme Court of Canada in *Nauss v. Halifax Longshoreman's Association, Local 269*, 83 CLLC 14,022 (S.C.C.)).

11. In applying section 69 of the Act, the Board has recognized that the operation of a hiring hall is a complicated matter which undoubtedly must involve an element of discretion: see, for example, *Raphael A. Julien*, [1985] OLRB Rep. April 537, and *Thomas Beck*, [1985] OLRB Rep. Jan. 14. The Board has also indicated that honest mistakes or errors in judgment in the exercise of such discretion do not generally fall within the ambit of section 69: see, for example, *John Cooper*, [1984] OLRB Rep. Jan. 6. However, the abuse of such discretion - such as using it to benefit relatives or friends, or to punish political enemies - is clearly violative of section 69: see, for example, *Joe Portiss*, *supra*.



12. For the detailed reasons set forth below, we are satisfied that the complainants have proven on the balance of probabilities that the respondent Union, which is engaged in the referral of persons to employment pursuant to various collective agreements, has contravened section 69 of the Act by acting in a manner that is arbitrary, discriminatory, or in bad faith in respect of a number of job referrals. The individual in charge of the operation of the Union's hiring hall, and primarily responsible for its contraventions of section 69, is the respondent Rocco D'Andrea. Mr. D'Andrea was elected as the Union's Business Manager in 1965 and continued to occupy that position for the ensuing twenty years, including the period of time covered by the instant complaints. Some responsibility for the Union's illegal actions is also borne by Orfeo Iacobelli, who was first elected as the President of the Local in 1967, and remained in that office at all material times. Orfeo's daughter, Anna Iacobelli, was hired by the Local in June of 1979 as a full-time employee after she graduated from high school. (She had previously worked for the Local on a part-time basis.) Ms. Iacobelli devoted almost all of her working time to the operation of the Local's hiring hall from June of 1979 to September of 1982, when she became the Local's bookkeeper. Thereafter, the hiring hall occupied only about ten per cent of her time. Although Ms. Iacobelli looked after many of the administrative and clerical duties involved in the day-to-day operation of the Local's hiring hall, she took instructions from Rocco D'Andrea and, to a lesser degree, from her father, who in addition to being the President of the Local, was also one its three business agents. She also occasionally took instructions from the other two business agents, Tony Sproviero and Dan D'Andrea, who is the son of Rocco D'Andrea. Job orders called in by employers were "okayed" by Rocco or one of the three business agents. Rocco and Orfeo reviewed the hiring hall records from time to time, and also from time to time made decisions concerning which members would be referred to work.

13. Prior to the Board's decision in the *Joe Portiss* case, *supra*, the Local's hiring hall was operated under a veil of secrecy and uncertainty. Members were denied access to the hiring hall records, and there were no written rules available to the membership concerning its operation. Some of the hiring hall procedures were, of course, known to members as a result of their personal experience and discussions with other members. For example, it was generally known that when members went to the Union office to report that they were out of work, their names would be entered on the Union's out-of-work list and they would each be given a number (between 1 and 1,000) in sequence of registration. Members could telephone or visit the Union office to find out what number was next to be called. When a member's number was reached on the list, Ms. Iacobelli (or another member of the Union's office staff) would attempt to telephone him at intervals of approximately ten minutes for a period of two hours. If he could not be contacted by the end of that two-hour period, his name would be struck off the list and would not be put back on (with a new number) for a period of seven days. Similarly, if a member quit a job, requested a layoff, or was discharged for cause, he would have to wait seven days before going back on the list if there were less than one hundred names on the list. (If there were more than one hundred names on the list, his name would be put on the list as soon as he came to the Union office to register.) If a member was laid off before he had worked twenty-four hours, he went to the top of the list and was sent out to the next available job. If he was laid off, that procedure would be repeated until he had accumulated a total of twenty-four or more hours of work.

14. Other hiring hall "rules" were less well known, if known at all, by members. Some members were aware that they could have one or more classifications placed beside their names

on the list, thereby entitling them to be called for work in such a classification ahead of unclassified members. Although not all members were aware of the Union's practice with respect to classification calls, it appears that the aforementioned two-hour rule did not apply to such calls; in the event that a member was not available when called for work in a particular classification, Ms. Iacobelli would simply move on to the next member who had the desired classification beside his name on the list. Failure to answer such a call or to accept such a job offer would not affect the member's position on the list.

15. The range of classifications which could be entered on the list was also a matter on which members were kept in the dark. Some members, including the complainants, were aware of the existence of some classifications, such as foreman, general foreman, cement finisher, and carpenter. However, the existence of some other classifications, such as gradesman and "vibrator man", was less widely known. Since it is clear from the evidence that most labourers would be able to perform the work of a "vibrator man" with little, if any, training, the respondents' failure to adequately advise the membership of the existence of that classification permitted those who were aware of its existence to obtain referrals which should have been available to others. Inequities also resulted from the fact that some members had classifications entered beside their names on the list at the direction of Rocco D'Andrea, while others, such as the complainants, were not assigned any classifications unless they specifically asked to have them entered beside their names each time they registered on the list.

16. Although the Union did not have any procedures by which light duty work was specifically allotted to injured or partially disabled members, some members were able to increase their prospects of obtaining such work by having classifications such as foreman, janitor, or tool crib affixed beside their names on the list. Others were able to avoid the usual consequence of refusing a job (i.e., being struck off the list and required to wait seven days before being assigned a new number) by obtaining a medical certificate indicating that they were unable to report to work due to sickness or disability. Under a hiring hall procedure adopted by the Union in 1969 on the recommendation of its Executive Board, but not made known to all of the members, a person who presented such a certificate would remain "in limbo" until he provided a second medical certificate certifying his fitness to return to work, after which he would be placed on the top of the list seven days later and given the first available referral. However, that procedure was not applied uniformly, as evidenced by the fact that while Clemente Cicchini was a member of the Executive Board, he was placed at the top of the list on March 25, 1983 and referred that day to SNC Foster-Wheeler following a period of absence, without obtaining a medical certificate certifying his recovery. (At the time of that referral, Mr. Marinaro, who had registered on the out-of-work list on November 19, 1982, was #955 on the list, and Mr. D'Alessandro, who had registered on December 16, 1982, was #118.) Respondents' counsel submitted that the Union's non-observance of that aspect of the rule was a technical matter which constituted, at most, a mistake or instance of inadvertence rather than a breach of section 69 of the Act. However, we are satisfied on the totality of the evidence that this failure by the Union to follow its hiring hall procedures in respect of an Executive Board member is but one example of a course of conduct clearly violative of section 69 of the Act, by which Executive Board members and others in good favour with Rocco D'Andrea received preferential treatment in respect of work referrals, while others who were not in good favour with him, such as the complainants, were discriminated against and dealt with arbitrarily and in bad faith.

17. There is nothing before the Board in these proceedings which suggests that the



Union's hiring hall records do not accurately reflect the dates on which members registered on the list, the dates on which employers called in job orders, and the dates on which members were referred by the Union to employment. Indeed, the complainants rely on that information to support their complaints that various other members who registered on the list after they were referred to jobs to which the complainants should have been referred. However, oral and documentary evidence adduced before us in these proceedings has led us to conclude that the Union's hiring hall records are unreliable concerning "classification" referrals. For example, the Union's hiring hall records indicate that Cecil Iacobelli was referred to Rankin (at MHG) on April 3, 1981 as a cement finisher. (Cecil Iacobelli is related to Orfeo Iacobelli, but it is common ground among the parties that the relationship between them is so distant that it is irrelevant to the present case.) The notation "C. finisher" appears beside Mr. Iacobelli's January 14, 1981 registration (as #597) on the list. "CF" also appears on what purports to be the Union's "carbon copy" of the referral slip (number 5863) which was given to Mr. Iacobelli in respect to that referral. However, it was Mr. Iacobelli's uncontradicted evidence that he has never been a cement finisher and that he did not ask to have that classification entered beside his name on the list. Indeed, it was his evidence that he had never even seen a cement finisher working, and did not know what they did, before he went to that job. Although it is not obvious at first glance, a closer examination of the notation "C. finisher" which appears beside Mr. Iacobelli's name on the list reveals that it has been written with a different pen (and, in all probability, by a different writer) than the entry of his name and telephone number on the list. Moreover, the original referral slip (Exhibit 40A in these proceedings) does not bear the letters "CF", which appear on the Union's "carbon copy" in carbon letters which are appreciably darker than the other letters and numbers which appear on that "carbon copy". The same is true of referral slip number 5075 and number 5972, by which Mario Galister and Frank Taglione were referred to Rankin (at MHG) on January 15, 1981 and February 18, 1981, respectively. The originals of those three referral slips were produced at the hearing of this matter by Daniel Rankin, the President of the Company to which those three persons were referred by the Local. Mr. Rankin was certain that those three persons were not ordered as cement finishers since his Company did not have the cement finishing subcontract on that project, that subcontract having been awarded to another subcontractor. Having regard to all of the evidence, we are satisfied that the aforementioned alterations of Union hiring hall records were carried out by Rocco D'Andrea, or by someone under his direction and control for whose actions he, as Business Manager of the Local, was ultimately responsible, for the purpose of misleading the Board or anyone else having occasion to enquire into the manner in which the Union's hiring hall was being operated.

18. The evidence of William Willis provides a further indication of the unreliability of the Union's hiring hall records insofar as they are relied upon by the respondents as providing documentary justification for referrals in which members have been sent to work ahead of the complainants in spite of the fact that the complainants were higher on the list at the time of the impugned referrals. It was Mr. Willis's uncontradicted evidence that on April 6, 1983 Rocco D'Andrea admitted in the presence of himself, Joe Portiss, and Evelyn Portiss, that he (Rocco) had altered the Union's hiring hall books to justify the referral of various persons to work, including an individual who had been permitted to join the Local and had been referred to work "right away" because his mother had made coffee for some members who were on a picket line in Mooretown. Although Rocco D'Andrea was present throughout most of the hearing of this matter, he was not called to contradict or qualify that evidence.

19. The unreliability of the Union's hiring hall records renders much of Anna Iacobelli's

evidence concerning individual referrals unreliable as well, since it was apparent that she was placing considerable reliance on those records in attempting to explain the impugned referrals. Moreover, although we found Ms. Iacobelli to be a fairly reliable witness concerning general hiring hall procedures, her evidence concerning the reasons why various members were referred to particular jobs can be given little weight as it was proven to be inaccurate in a number of respects. For example, it was her evidence that Jaime Lopes was referred to Collavino (at Polysar) on July 14, 1981, because he was one of the men that Collavino was allowed to bring in from Windsor on the understanding that Collavino would hire additional labourers through the Local. She testified that Mr. Lopes, Rocco D'Andrea, Orfeo Iacobelli, and the Project Manager told her that. However, Mr. Lopes, whom we found to be a candid and credible witness, testified that he had never worked for Collavino prior to the job in question. It was his evidence that he went to the Union office in July of 1981 to speak to Rocco D'Andrea on the advice of some friends who had told him there was a "big job" open at Collavino. He told Rocco that he was a qualified cement finisher who was looking for work. Rocco stated that he would attempt to find him a job as a cement finisher. A few days later he was referred to Collavino (at Polysar) as a cement finisher. The referral slip given to him by the Union was dated July 17, 1981, and indicated that he was to report for work the following morning. Mr. Lopes worked there for approximately a month as a cement finisher, and then remained on the site for almost a year as a general labourer in the employ of Collavino. At the time of the impugned referral Mr. Lopes was #250 on the list. Mr. Marinaro was ahead of him on the list, having registered on July 7, 1981 as #192. The classifications listed beside Mr. Marinaro's name and forming part of that entry include "CF" which, it is common ground, stands for cement finisher.

20. Counsel for the respondents argued that the referral of Mr. Lopes to the job in question was within the Business Manager's authority under the discretion vested in him by the following recommendation made by the Executive Board at its June 17, 1981 meeting, and adopted by the membership on July 9, 1981 at a regular general meeting:

The Exc. Board recommends that the business manager be impowered [sic] & authorized to move among jobs, transfer or reffer [sic] workers because of thier [sic] skill or classification as he deems necessary in order to enhance the interest of this local union, the Labourer Int Union of N.A. & the compliance of [sic] the provincial collective agreement in the I.C.I. sector.

However, in the absence of testimony by Rocco D'Andrea concerning why Mr. Lopes was referred to job in question ahead of Mr. Marinaro, who was also an experienced cement finisher, we do not find that argument to be persuasive. The evidence clearly establishes that Mr. Marinaro and Rocco D'Andrea were political rivals and that Mr. D'Andrea was of the view that the powers of his office could be used to penalize such persons. In this regard, it was the uncontradicted evidence of Clement Cicchini that during May of 1981 Rocco D'Andrea told Mr. Cicchini and some of the other members of the Executive Board that after the Union election, Mr. Marinaro and the other persons who were running against them in the election would "have to be laid off on any job that they came to". Given Rocco D'Andrea's ability and expressed willingness to penalize his political rivals by denying them work opportunities, it was incumbent upon him to come forward with a plausible explanation for what appears to be an anomalous and arbitrary job referral. Under the circumstances, we are satisfied on the balance of probabilities that the Union contravened section 69 of the Act in referring Mr. Lopes to Collavino without first offering the referral to Mr. Marinaro.

21. Another example of the unreliability of Anna Iacobelli's evidence concerning



individual referrals is provided by her testimony concerning the Union's August 20, 1982 referral of Anthony Belak. It was her recollection that Mr. Belak, who registered on the list as a foreman on May 21, 1982 (as #270), was name hired by Eastern Construction on August 20, 1982. However, David Anderson, who was Eastern's Project Manager on the site in question, testified that he telephoned the Local and merely asked for a foreman when he placed the job order in question by speaking with Orfeo Iacobelli. It was his evidence that he did not ask for Anthony Belak or anyone else by name when he phoned in that order. Mr. Anderson was a candid and credible witness whose evidence we accept without reservation. In this regard, it is noteworthy that although Orfeo Iacobelli was present during these proceedings, he was not called to contradict or qualify Mr. Anderson's evidence. At the time of that referral, Mr. Marinaro, who had registered on the list on May 7, 1982 as a foreman (and cement finisher) was #212 on the list. He was not referred to work until September 10, 1982. Thus, the Union has again failed to provide a credible explanation as to why Mr. Belak was referred to that job at a time when Mr. Marinaro was ahead of him on the list. In the absence of such explanation, we find that the Union contravened section 69 by referring Mr. Belak to that job out of order of registration.

22. Counsel for the respondents sought to defend some of the impugned referrals on the basis that the complainants had failed to establish that they had been made "pursuant to a collective agreement". It is clear from the wording of section 69, and the Board's jurisprudence concerning that provision, that it applies only to situations in which a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment pursuant to a collective agreement. (See, for example, *Blue Line Taxi Company Limited*, [1983] OLRB Rep. Feb. 192, and *Local 247 of the Labourers' International Union of North America*, [1979] OLRB Rep. July 675.) However, as noted by complainants' counsel in his reply argument, Anna Iacobelli (who was summoned by the complainants to testify as a witness in these proceedings) testified that she would not send men to a "non-union job". Having regard to that uncontradicted evidence and to all of the other evidence in this case concerning the existence of collective agreements by which the Union is bound, we are satisfied on the balance of probabilities that at all material times the Union was engaged in the referral of persons to employment "pursuant to a collective agreement", within the meaning of section 69 of the Act, and that the protection which that provision provides against arbitrariness, discrimination, and bad faith applies to each of the impugned referrals.

23. Before detailing our findings with respect to the numerous other referrals impugned by Mr. Marinaro, we will digress to consider various matters pertaining to the complaint of Luciano D'Alessandro. Mr. D'Alessandro has been a member of the Local since 1957. He was elected as its President for one term prior to the events which gave rise to this complaint. He was also appointed by the Executive Board as Recording Secretary at one time, but resigned from that position. (He also ran for the position of Secretary-Treasurer in 1971 and 1979, but was defeated.) Mr. D'Alessandro sustained a back injury while working on a job site on May 8, 1968. Since then he has undergone a variety of medical treatments with limited results. It is common ground among the parties that the respondents were aware at all material times that Mr. D'Alessandro had a back problem. Although Mr. D'Alessandro has been able from time to time to perform some jobs which require little exertion or movement, such as "spark watch" (i.e., watching for fire where "burners" are welding) and some work as a foreman, he has refused or left many other jobs, including foremen's jobs, because of physical problems including dizziness and pain in his back, legs, and head. The Union referred him to work as a foreman for Rankin (at MHG) on December 9, 1980. He worked there until

November of 1981 when he left work because he was experiencing pain while climbing and going from place to place on the site in the performance of his normal functions as a foreman. He never returned to work for Rankin as he was laid off as a result of a shortage of work before he was physically able to return to work. Since his physician suggested that he attempt to return to work in order to experiment to see what he was capable of doing, he registered on the Union's out-of-work list on March 3, 1982 as #685, with foreman and "GF" (i.e. general foreman) as the classifications entered beside his name. He refused a referral on May 11, 1982 and was returned to the list on May 18, 1982 as #255, with tool crib, foreman and general foreman as his classifications. When his number came up on September 28, 1982, he was not at home to receive the referral since he was in Toronto concerning a family matter. Upon his return from Toronto, he registered on the list on September 30, 1982 as #629. He refused the next referral that was offered to him (on December 6, 1982), on the ground that it was general labourers' work which he was unable to perform due to his physical condition. His name was returned to the list on December 16, 1982 as #118. He refused the next job offered to him on June 22, 1983 on the same ground. On the following day he was listed as #680 with "labourer foreman" as his classification. On March 26, 1984 he was called again by the Union and again refused a job referral.

24. Mr. Alessandro was granted a ten per cent permanent partial disability award effective November 15, 1978, under what is now the *Workers' Compensation Act*, for residual disability resulting from his May 8, 1968 accident. In a decision dated February 2, 1981, the Appeal Board rejected Mr. D'Alessandro's claim that he remained totally disabled as a result of that accident.

25. Mr. D'Alessandro, who was called as a witness (on the merits) by counsel for the respondents, testified that during the period covered by his complaint, his condition became worse. It was his evidence that he tried to work around the house by cutting the lawn and gardening, but was unable to do so for very long because he "got dizzy, got cramps and had to leave it". Indeed, he testified that he sometimes had too much pain to even sit down. Although he testified that he would like to go to work if he could find something that was suitable, he also stated, "I don't know myself what kind of work I will be able to stand up to." After reiterating that he did not know if there was any work that he could have done during the period in question, he testified (in response to a leading question from his counsel) that he could have worked as a flagman, could have done "spark watch" work, and could have performed a foreman's job on some kinds of projects. During his re-examination by respondents' counsel, Mr. D'Alessandro conceded that he did not know if he could have been a flagman standing in one place for many hours each day. He agreed that he could not have been a working foreman, but asserted that he could have been a non-working foreman. However, he conceded that the job which he left at Rankin in November of 1981 was that of a non-working foreman, and that his condition had worsened after he left that job.

26. Dr. William Southcott, an orthopaedic surgeon to whom Mr. D'Alessandro had been referred by his family physician, was called as a witness in these proceedings by counsel for the respondents. Dr. Southcott testified that his diagnosis of Mr. D'Alessandro's condition was that he was suffering from chronic mechanical (muscular) back pain. He also told the Board that chronic pain of that type "can go on for years" and can be aggravated by "anything", including, at times, even a "simple movement". However, it was also his evidence that when he physically examined Mr. D'Alessandro in May of 1983, he found him to be a well built, muscular man whose level of fitness indicated that he must have been engaging in heavy

activities in order to keep in shape. Thus, he concluded at that time that Mr. D'Alessandro was physically able to return to a job entailing heavy work. However, he also suggested (in his report to Mr. D'Alessandro's family physician) that since Mr. D'Alessandro experienced problems every time he returned to work, it might be wise to have him re-evaluated by the Workers' Compensation Board medical team at Downsview. In explaining that advice, Dr. Southcott told the Board that there would be psychiatrists and psychologists at Downsview who could deal with problems which he was not qualified to evaluate. He further testified that such re-evaluation might lead to retraining or further compensation.

27. Mr. D'Alessandro ran against Orfeo Iacobelli for the office of President of the Local in 1981. Rocco D'Andrea and other members of the Executive Board attempted to persuade him to change his mind about running against Mr. Iacobelli, but he was not dissuaded. After Mr. D'Alessandro was defeated by Mr. Iacobelli, Rocco D'Andrea displayed animosity toward him at several Union meetings. For the reasons set forth below, we are also satisfied on the totality of the evidence that he used his control over Local 1089's hiring hall to penalize Mr. D'Alessandro by denying him job opportunities that should have been offered to him. Whether Mr. D'Alessandro would have been physically able to perform those jobs is, of course, a factor to be taken into account in determining the quantum of compensation to be paid to him by the Union in respect of its contraventions of section 69 of the Act.

28. As a result of the amendment to Mr. D'Alessandro's complaint permitted by the Board in its oral ruling of February 2, 1984 (as set forth above), there are a total of six referrals impugned by Mr. D'Alessandro:

- (1) Mario Savo to Chemstand Machine & Equipment Limited ("Chemstand") on September 10, 1982;
- (2) Gino Iacobelli to Lummus on September 10, 1982;
- (3) Aldo Rocca to MHG-DB-Catalytic on October 18, 1982;
- (4) Alberto D'Andrea to SNC-Foster Wheeler on March 16, 1983;
- (5) Clemente Cicchini to SNC-Foster Wheeler on March 25, 1983; and
- (6) Peter Vani to Foster Wheeler on September 15, 1983.

29. The Union's March 25, 1983 referral of Mr. Cicchini has already been dealt with in this decision (in the context of the Union's procedures with respect to medical certificates) and has been found to constitute a violation of section 69 of the Act. Three of the remaining five referrals (namely, numbers 1, 2, and 4) have also been challenged by Mr. Marinaro, and we are of the view that the propriety of the remaining two must also be assessed in the context of the totality of the evidence which is before the Board in this case. Accordingly, we shall proceed to deal with the balance of the referrals challenged by Mr. Marinaro, including the four which are also challenged by Mr. D'Alessandro, and will then return to the two remaining referrals which are challenged by Mr. D'Alessandro.

30. On July 16, 1981, Alberto Michetti (who had been referred by the Union to Combustion Engineering two weeks earlier) registered on the list as #266. The classifications



entered beside his name at the time of his registration were asphalt raker and foreman. On the following day he was referred to Armbro (at Highway 40B, across from the Guildwood Inn), ostensibly as a gradesman. At the time of that referral, Mr. Marinaro was #192 on the list, having registered on July 7, 1981. He was not referred to work until August 17, 1981. The word "gradesman" has been squeezed in beside Mr. Michetti's name (above the words "asphalt raker" and "foreman") with a different pen from that used to write those other words, as well as Mr. Michetti's name and telephone number. In view of that unexplained addition, and our foregoing findings concerning the unreliability of Anna Iacobelli's evidence and of the Union's hiring hall records pertaining to "classification" referrals, we have concluded on balance that the Union contravened section 69 of the Act by referring Mr. Michetti to that job out of order of registration on the list.

31. On July 23, 1981, Joao De Melo was referred to Grandbar as a cement finisher. At the time of that referral he was #258 on the list, having registered on July 15, 1981. The classifications shown beside his name are vibrator man and cement finisher. As indicated above, Mr. Marinaro had registered on the list on July 16, 1981 (as #266). The classifications entered beside his name at that time were cement finisher, carpenter, and foreman. Ms. Iacobelli told the Board that she was unable to remember whether or not Mr. Marinaro had been called before this job was offered to Mr. De Melo, although she also stated that she "assumed" that he had. In the absence of any reliable evidence which indicates that the proper hiring hall procedures were followed in respect of this referral, we find that in the context of the pattern of improper referrals that has been established in this case, the referral of Mr. De Melo was also made in contravention of section 69 of the Act.

32. On July 24, 1981 Manuel Albino who had registered on the list on July 15, 1981 as #259, was referred to Collavino (at Polysar). The classification "pipelayer" appears beside his name in the same ink as his telephone number and registration number. The words "vibrator man" have been written above "pipelayer" with a different pen, and the words "vibrator man" on the Union's carbon copy of the applicable referral slip (No. 12278) are appreciably darker than the other letters and numbers which appear on that "carbon copy". Moreover, Collavino's employment records indicate that no premium pay was paid to Mr. Albino. Having regard to all of those circumstances, which, when considered together, are strongly suggestive of Union hiring hall record alterations similar to those established in relation to the three Rankin referrals described above (in paragraph 17), we can give no credence whatsoever to the suggestion that this referral can be justified as a classification referral. We also do not accept the alternate explanation proffered by Ms. Iacobelli, that this referral was an application of the rule under which an employee who had worked for a cumulative total of less than twenty-four hours remained at the top of the list. The list does not support that explanation and we are not persuaded that the list is erroneous in this regard as suggested by Ms. Iacobelli. Under the circumstances, we find this referral to be a further contravention of section 69.

33. John E. Ianozzi joined the Local at age eighteen in February of 1981, after graduating from high school in January of that year. Mr. Ianozzi and his parents are neighbours of Rocco D'Andrea, whose home is next door to theirs. When he met with Mr. D'Andrea to apply for membership in the Union, Mr. Ianozzi told him that he could do carpentry work and cement finishing. His experience in doing that work consisted of summer time and part-time work which he had performed for his father's residential construction business. Following two referrals which are not in question in these proceedings, Mr. Ianozzi registered on the



list on July 13, 1981 as #229. The letters "CF" have been written beside his name on the list with a different pen from that which was used to enter his name and telephone number. He has no recollection of asking to have those letters placed beside his name. He was referred to De Carolis General Contractors on July 28, 1981. At the time of that referral, Mr. Marinaro was #192 on the list, having registered on July 7, 1981 (with cement finisher, carpenter, and foreman as his listed classifications). Neither Ms. Iacobelli nor any other witness provided the Board with any explanation of why Mr. Ianozzi was referred to that job ahead of Mr. Marinaro. Having regard to all of the circumstances, we are satisfied on the balance of probabilities that the referral in question involved unwarranted favouritism toward a neighbour of Rocco D'Andrea, and illegal discrimination against Mr. Marinaro, which has no place in the operation of a union hiring hall.

34. Peter Rocca was referred to Collavino on August 10, 1981. At the time of that referral he was #324 on the list, having registered on July 24, 1981. Mr. Marinaro was still #192 at that time. Ms. Iacobelli told the Board that Mr. Rocca was referred to that job as a vibrator man. However, Collavino's payroll records indicate that no premium was paid to Mr. Rocca. Having regard to that fact, in combination with our aforementioned findings concerning the unreliability of the Union's hiring hall records and of Ms. Iacobelli's evidence, we are satisfied that this referral was also made in contravention of section 69 of the Act.

35. On the following day, Mike Fazzalari, who was #331 on the list was referred to Collavino. Neither Ms. Iacobelli nor any other witness provided the Board with any explanation of why Mr. Fazzalari was referred to that job ahead of Mr. Marinaro, who remained #192 on the list. In the absence of any such explanation, it is reasonable to infer in the circumstances of this case that this referral is a further example of illegal discrimination against Mr. Marinaro.

36. The next referrals impugned by Mr. Marinaro occurred on February 8, 1982, when Edgar Bettencourt and Gaetano Ventura, who were #503 and #504 on the list, were referred to INS-CO Sarnia Ltd. ("INS-CO") at Polysar. At the time of that referral, Mr. Marinaro was #464 on the list having registered on January 13, 1982 with the classifications of carpenter and foreman beside his name. Mr. Bettencourt had been employed at INS-CO at the site in question from March 9, 1981 until January 22, 1982 when he was laid off. Mr. Ventura was also laid off that day, following six months of employment by INS-CO at that site. In permitting INS-CO to recall them to work at that site, Local 1089 was honouring the terms of a "Project Agreement" incorporated into a Memorandum of Settlement (Exhibit 22) that was entered into on January 17, 1980 by various parties including INS-CO and the Building and Construction Trades Council of Sarnia and Lambton County. Article 4.05 of the Agreement provides:

Terms of hiring to be at the Employer's sole option and discretion to select from the out-of-work list of tradesmen required.

Thus, we are satisfied that the Union did not contravene section 69 in referring Messrs. Bettencourt and Ventura to INS-CO on February 8, 1982. The same is true of the referral of Abraham Frederick, Richard Labine, and Dan Teixeira to employment with INS-CO at the Polysar project on August 6, 1982.

37. Kevin Glynsinski was referred to Alznar Contractors Ltd. (at Lambton Mall) on

February 12, 1982. At the time of the referral, Mr. Glynski was #554 on the list having registered on January 29, 1982. Mr. Marinaro remained #464 on the list at that time. (He was not referred to work until March 31, 1982.) The Union seeks to justify that referral on the basis that it was a classification referral of Mr. Glynski as a forklift operator. However, the aforementioned pattern of a classification ("F LIFT") being written beside an employee's name on the list with a different pen, and that same classification appearing on the Union's "carbon copy" of the referral slip in carbon letters which are appreciably darker than the other letters and numbers on the slip, has repeated itself in respect of this referral. Moreover, the Union's "job order book" (Exhibit 28) does not support the Union's position concerning this referral, nor do the employer's payroll records. In the totality of the circumstances, we find that this referral constitutes a further instance in which section 69 has been violated by the Union.

38. The evidence adduced with respect to the reason why Carmine Moretta, who registered on the list as #492 on January 20, 1982, was referred to work ahead of Mr. Marinaro (#464) was also far from satisfactory. Ms. Iacobelli was unable to find any justification in the Union's hiring hall records for the referral of Mr. Moretta to Da Cunha Masonry on February 16, 1982, but told the Board, "I seem to recall Moretta being name hired by Da Cunha". However, the unreliability of her evidence concerning that referral was underscored by the fact that she also testified that she thought that De Cunha was under the road and sewer collective agreement. It is common ground among the parties that Da Cunha is bound by the ICI Provincial Agreement. Under the circumstances, we are satisfied on the balance of probabilities that this referral also constituted a breach of section 69 vis-a-vis Mr. Marinaro, who, as noted above, was not referred to work until March 31, 1982.

39. Mr. Marinaro also challenges the referral of Michele Gabriele to Alvaro Contractors Ltd. ("Alvaro") at MHG on March 4, 1982. At the time of that referral, Mr. Gabriele was #593 on the list, having registered on February 10, 1982, following his layoff by that same employer on or about that date. Mr. Marinaro was #464 on the list at that time. However, the evidence adduced before us establishes that the Union was obligated to refer Mr. Gabriele to that job by virtue of the following recall provision contained in the Cement Finishers Appendix to the Provincial Agreement that was in force at that time:

- 2.04 The Employer may request by name the recall of an Employee who has worked during the preceding twelve (12) months for that Employer, provided that the Employer shall give preference to the most senior Employees who are currently on lay-off if those Employees can perform the work available.

Accordingly, we are satisfied that the Union did not contravene section 69 by referring Mr. Gabriele to Alvaro on March 4, 1982. Similar reasoning applies to the Union's referral of Raffaele Di Frederico to Alvaro on March 19, 1982, following his lay-off by that employer on or about January 26, 1982.

40. Saleotino Da Silva registered on the list on February 5, 1982 as #573. The entry to the right of his name and telephone number on the list is "Da Cunha Mar 4/82". That entry would normally be indicative of a referral to Da Cunha on the specified date. However, there is no job order for that employer recorded in the Union's job order book on that or any contemporaneous date, nor is there a referral slip. Thus, the Union's hiring hall records confirm Ms. Iacobelli's evidence that the Union did not refer Mr. Da Silva to Da Cunha but rather merely found him working for that employer on March 4, 1982. Thus, the March 4, 1982 entry was made to remove his name from the list. Having regard to all of the

circumstances, we find that no breach of section 69 has been proven in respect of Mr. DaSilva. Similar considerations apply to Adriano Medeiros, who was permitted by the Union to continue working for Area Construction after he was found working for that employer on or about July 20, 1982, following his direct recall to employment by that Company, which had previously employed him from November 3, 1981 to mid June of 1982.

41. Vaniglio Michieli registered on the list on February 15, 1982 as #616. The classification "carpenter" appears directly besides his name in the same ink as his name and telephone number. Ms. Iacobelli attempted to justify his referral to Catalytic (at Esso) on March 9, 1982 on the basis of a classification referral as a janitor. However, we do not find that explanation to be reliable. The word "janitor" has been squeezed in above the word "carpenter" with a different pen, and the referral slip does not contain any indication that Mr. Michieli was being referred as a janitor. Moreover, it is open to serious question whether any such classification existed at that time. If it did, its existence had certainly not been adequately communicated to the membership. Thus, the respondent has not rebutted the *prima facie* case established in the circumstances of the present case by the fact that Mr. Michieli was referred to the job in question ahead of Mr. Marinaro.

42. Orlando Iacobelli registered on the list on March 1, 1982 as #678. He was referred to Alvaro (at MHG) on March 22, 1982 as the cement finisher, at a time when Mr. Marinaro, who was also classified as a cement finisher, was #464 on the list. Ms. Iacobelli told the Board that Orlando Iacobelli was referred to Alvaro out of order because "Alvaro could name hire whomever it wanted on that job". In his submissions on behalf of the Union, Mr. Minsky suggested that this referral was made pursuant to the Business Manager's discretion under the aforementioned Executive Board recommendation adopted by the membership on July 9, 1981. However, in the absence of testimony by Rocco D'Andrea concerning why it was necessary or appropriate to refer Mr. Iacobelli to that job instead of Mr. Marinaro, who as noted above was also an experienced cement finisher, we do not find that argument to be persuasive. Having regard to all of the circumstances, we find that the referral of Mr. Iacobelli to Alvaro on March 22, 1982 contravened section 69 of the Act. Similar considerations apply to the referral of Pasquale Muscedere to Alvaro (at MHG) on September 3, 1982, at a time when Mr. Muscedere, who registered on August 23, 1982, was #490 on the list and Mr. Marinaro was #212, having registered on May 7, 1982.

43. Mr. Marinaro also impugns the referral of Jim A. Belak to McKay Cocker Construction Limited ("McKay") on March 26, 1982. However, it is clear from the evidence that Mr. Belak had been employed by McKay from June 12, 1981 to March 10, 1982, and that his referral back to that employer on March 26, 1982 was justified (and required) by Article 3.1(b) of the May 1, 1980 to April 30, 1982 collective agreement (Exhibit 23) between Local 1089 and McKay, which provided:

The Employer shall have the prerogative when adding to its working force to first re-hire former regular employees who have been employed by the Employer for at least three (3) of the proceeding [sic] twelve (12) months.

The same is true of the Union's March 29, 1982 referral to McKay of John Medeiros, who had previously been employed by that Company from September of 1981 until December 11, 1981, and of the Union's June 7, 1982 referral to McKay of Antonio Bento, who had been employed by that Company from June 29, 1981 until mid May of 1982.

44. Perry Sinclair transferred into the Local on May 2, 1982 from Local 1111 in



Calgary, Alberta, and registered on the list that day as a signal man. Ms. Iacobelli had been told by business agent Tony Sproviero that Mr. Sinclair was an expert signal man who was being allowed to transfer into Local 1089 to do signal work for Hardrock Forming Company ("Hardrock") at Petrosar. On May 14, 1982, Ms. Iacobelli received the expected job order from Hardrock and referred Mr. Sinclair to that site pursuant to Mr. Sproviero's instructions. We are satisfied on the totality of the evidence that the referral of Mr. Sinclair to Hardrock on May 14, 1982 did not contravene section 69 of the Act, and did not in any event deprive Mr. Marinaro of any work as he was not qualified to perform the work of a signal man.

45. Silverio Sardo was employed by C & R Masonry Ltd. ("C & R") from April 12, 1982 until sometime in early May of 1982, pursuant to a referral which is not in question in these proceedings. On May 13, 1982, he registered on the list as #230. During June of that same year, the Union discovered that he had been recalled to work directly by C & R without notification to Local 1089. The Union permitted him to continue working there, presumably because C & R was entitled to recall him by name pursuant to Article 2.04 of the Cement Finishers Appendix to the Provincial Agreement (as set forth earlier in this decision). Under the circumstances, we find that a contravention of section 69 has not been established with respect to Mr. Sardo. Similar considerations apply to Joaquim Bento, whom the Union found to be working for C & R in June of 1982, after being laid off by that Company in early May of 1982 following fourteen months of continuous employment.

46. After working for Shaeffer-Townsend for about seven years, John De Macedo was laid off by that Company on or about June 4, 1982 as a result of a strike by another trade. The evidence establishes that it was the Union's practice to treat a lay-off resulting from a labour dispute differently than a lay-off resulting from a shortage of work. Persons laid off as a result of a labour dispute were permitted to register on the list on the understanding that if their numbers came up before the labour dispute ended, they would be referred to other jobs, but that if their numbers had not come up by the time the labour dispute ended, they would be permitted to return to their former jobs. In accordance with that practice, the Union referred Mr. De Macedo back to Shaeffer-Townsend on June 25, 1982, since the strike had ended and work had resumed. As noted above, the Board has recognized that the operation of a hiring hall will invariably involve an element of discretion. Under the circumstances, we find that Union officials did not act in a manner that was arbitrary, discriminatory, or in bad faith in exercising their discretion in that fashion. Thus, we find that the Union did not contravene section 69 in permitting Mr. De Macedo to return to Shaeffer-Townsend after the strike which had interrupted his employment with that Company had been settled. Similar reasoning applies to the referral of Clarimundo Silva, Antonio Sousa, Tony Williams, Roger Lapratt, and Jim Brooks to MHG-DB-Catalytic on August 27, 1982, following the resolution of the labour dispute which gave rise to their lay-off by that Company on July 30, 1982.

47. Tony D'Andrea, who is not related to Rocco or Dan D'Andrea, registered on the list on May 7, 1982 as #219. The initials "CF" appear beside his name on the list. Mr. Marinaro had registered as a foreman and cement finisher three days earlier, and had been given #212. Tony D'Andrea was referred to Alvaro (at MHG) as a cement finisher on August 16, 1982. At the time of that referral, Mr. Marinaro was still #212 on the list as he had not been referred to work. He remained unemployed until September 10, 1982, when he was referred to Chemstand. Ms. Iacobelli testified that Tony D'Andrea was referred to that job because he was requested by Alvaro. She also told the Board that Alvaro was allowed to request whomever it wanted on that particular job by virtue of an arrangement which the



Company made when it signed a collective agreement with the Local. The unreliability of that evidence is apparent from the undisputed fact that Alvaro was bound by the Provincial Agreement at all material times. Dan D'Andrea also testified concerning that referral. He initially told the Board that Tony had come to the Union office and told him that Alvaro wanted to name hire him. However, he then changed his evidence by testifying that Tony had told him that Alvaro wanted to recall him. It was Dan's understanding that although Tony had not worked for Alvaro as a labourer in the preceding twelve months, he had done "some kind of supervisory work or clerical work" for Alvaro during that period. Dan testified that after the matter had been considered by himself, his father, and Orfeo Iacobelli, it was decided to allow Alvaro to recall him pursuant to Article 2.04 of the Cement Finishers Appendix to the 1982-84 Provincial Agreement (which is identical to Article 2.04 of the Cement Finishers Appendix in the 1980-82 Provincial Agreement, as quoted above). Dan told the Board that it was decided to permit this "recall" because Article 2.04 merely requires the employee to have worked for the employer during the preceding twelve months, and does not expressly require him to have worked as a labourer. However, we did not find his testimony to be convincing; having regard to his demeanour while testifying and to the other factors pertinent to assessing the credibility of a witness (as set forth earlier in this decision), we have concluded that this expansive interpretation of Article 2.04 is simply a rationalization that has been adopted in an attempt to shield the Union from liability in respect of the referral in question. In concluding that this referral was made in contravention of section 69, we have also taken into the account the fact that Rocco D'Andrea and Orfeo Iacobelli did not testify before the Board concerning what prompted them to approve the referral of Tony D'Andrea to that job at a time when Mr. Marinaro was *prima facie* entitled to be offered the referral before the Union offered it to Tony D'Andrea.

48. Tony D'Andrea was subsequently laid off by Alvaro in January of 1983 and, after registering on the list on January 14, 1983, was referred back to Alvaro when that employer recalled him on April 12 of that year. If Mr. D'Andrea had been legitimately referred to Alvaro on August 16, 1982, his referral back to that employer on April 12 would clearly have been justified by Article 2.04 of the Provincial Agreement. However, in view of our finding that the August 16, 1982 referral was made in contravention of section 69, it is arguable that his subsequent referral to Alvaro on April 12, 1983 was also in contravention of section 69, or at least gave rise to further liability on the part of the Union insofar as it constituted a further deprivation of work opportunities that might have been available to Mr. Marinaro, who was ahead of Tony D'Andrea on the list on April 12, 1983 when the latter was referred again to Alvaro. However, it is unnecessary to express a final conclusion on that matter at the present time as it is a matter which can be addressed by the parties during the quantification stage of these proceedings, in the event that the parties are unable to resolve the matter without further intervention by the Board.

49. As noted above, the referral of Mario Savo to Chemstand on September 10, 1982 was challenged by both Mr. Marinaro (who was #212 on the list at that time, as a result of having registered on May 7, 1982) and by Mr. D'Alessandro (who was #255 on the list at that time, having registered on May 18, 1982). Up to the time of that referral, Mr. Savo had been working for Rankin (at MHG), having been referred to that job by the Union on June 11, 1982 after registering on the list on April 29, 1982. Mr. Savo's September 10 referral to Chemstand was made without any registration by him on the list. Ms. Iacobelli told the Board that Mr. Savo was referred at the direction of Rocco D'Andrea because Chemstand had requested a "cement finishing foreman" and she was unable to find anyone else on the list

who was a cement finishing foreman. When it was drawn to her attention by complainants' counsel that Mr. Marinaro had registered on the list on May 7, 1982 with "foreman" and "cement finish [sic]" entered beside his name, Ms. Iacobelli testified that she was looking for a "cement finishing foreman, not just a cement finisher and a foreman". She also told the Board, "It's common knowledge that if a man registers as a foreman, it's just a labour foreman, unless he registers as a cement finishing foreman or something else." However, there is no indication in the hiring hall records which were placed in evidence in these proceedings that Mario Savo ever registered as a cement finishing foreman. The classifications listed beside his April 29 registration are "Foreman" and "GF" (i.e., General Foreman). The classifications which appear beside his November 18, 1980 registration are "C Finisher" and "T. Driver". (The Union records concerning his initial registration on the list (on October 10, 1980) have not been placed before the Board in these proceedings.) Although the referral slip given to Mr. Savo in relation to his September 10, 1982 referral to Chemstand indicates that he was referred as a "Foreman" and makes no reference to the term "cement finishing foreman", Dan D'Andrea told the Board that Mr. Savo was referred to Chemstand as a cement finishing foreman. It was also his evidence that Mr. Savo's referral was an example of the Business Manager exercising his discretion (under the aforementioned Executive Board recommendation adopted by the membership on July 9, 1981) to transfer a member from one job to another because of his skill or classification. However, in the absence of testimony by the Business Manager concerning why he found it necessary or appropriate to transfer Mr. Savo to that job at a time when Mr. Marinaro, who was also an experienced cement finisher and foreman, had been unemployed for over four months, we are not prepared to accept that explanation. Having regard to all of the circumstances, including Mr. Marinaro's *prima facie* entitlement to the referral in question, the unreliability of the testimony of Anna Iacobelli and Dan D'Andrea, the failure of Rocco D'Andrea to testify notwithstanding the evidence of Ms. Iacobelli that it was Rocco who directed her to refer Mr. Savo to the job in question, and the lack of any cogent evidence establishing that Mr. Savo was more qualified to perform the work than Mr. Marinaro, we find that the Union contravened section 69 of the Act by referring Mr. Savo to the job in question on September 10, 1982 without first offering it to Mr. Marinaro. However, no violation of section 69 has been established vis-à-vis Mr. D'Alessandro in the context of that referral, as the evidence does not establish that he had the requisite cement finishing expertise.

50. The totality of the circumstances, including the unreliability of the Union's hiring hall records and of Anna Iacobelli's and Dan D'Andrea's evidence in respect of "classification" and "name hire" referrals has led us to conclude that the Union also contravened section 69 of the Act in making each of the following referrals: Domencis Luis to Leo-Jan Masonry (at Harbor Street) on June 1, 1982, when Mr. Luis was #251 on the list and Mr. Marinaro was #212; Manuel Dos Santos to Alznar (at the Lambton Mall) on June 23, 1982, when Mr. Dos Santos was #250 on the list and Mr. Marinaro remained #212; Francois Bezeau to Sartori and Son Company Limited on August 27, 1982, when Mr. Bezeau was #429 and Mr. Marinaro remained #212; Dan Teixeira to Tempo Construction Limited on August 31, 1982, when Mr. Teixeira was #515 and Mr. Marinaro remained #212; and Manuel Dos Santos to Filipowich on August 31, 1982, when Mr. Dos Santos was #458 on the list and Mr. Marinaro remained #212. Similar considerations have led us to conclude that the Union's referral of Orfeo Iacobelli's brother Gino to Lumus on September 10, 1982 contravened section 69 of the Act. At the time of that referral, which reflects an unmistakable element of nepotism that has no place in the proper operation of a union hiring hall, Mr. Marinaro remained #212 on the list and Mr. D'Alessandro, who had registered on May 18, 1982, was #255.



51. Mr. Marinaro also questions the validity of the Union's referral of Eric Burger to MHG-DB Caralytic on March 8, 1983. However, the evidence establishes that Mr. Burger was validly name hired by that employer on the date in question, pursuant to Minutes of Settlement (Exhibit #38) entered into on March 7, 1983 by the Union and the employer in full settlement of a grievance dated January 28, 1983, in which the Union alleged that the employer had violated the Provincial Agreement by failing or refusing to appoint the agreed number of foremen, and by locking out Mr. Burger and other members of Local 1089. That grievance was referred to the Board under section 124 of the Act (File No. 2281-82-M) and was subsequently withdrawn (by leave of the Board) in accordance with that settlement. In his written reply argument, counsel for the complainant submitted that the fact that the parties made an agreement does not give them the right to negotiate away the rights of people not privy to the agreement. However, that submission misses the mark in the present case, as the complainants had no "right" to be referred to the job in question in place of Mr. Burger, who was validly name hired under the Provincial Agreement, particularly where that name hire was being used to redress what the Union believed in good faith to be a grievable wrong against Mr. Burger. Complainants' counsel also suggested that the reasons advanced by the Union for making this and many of the other impugned referrals should not be accepted by the Board because they were not revealed to the complainants until the hearing of this matter. Although a trade union is not legally obligated to provide such reasons prior to a hearing in respect of a section 69 complaint, it is generally desirable for it to do so in that it may eliminate the need for costly and time consuming litigation. Moreover, as submitted by complainants' counsel, the fact that such reasons have not surfaced before the hearing is a factor which the Board may take into account in determining whether they are *bona fide* justifications or after the fact fabrications. However, we are satisfied that the reason which the Union has given for referring Mr. Burger to MHG-DB-Catalytic is the true reason for that referral, and we are also satisfied for the foregoing reasons that the Union did not breach section 69 in making that referral.

52. As noted earlier in this decision, the referral of Alberto D'Andrea to SNC Foster Wheeler on March 16, 1983 is challenged by both Mr. Marinaro and Mr. D'Alessandro. (In Mr. Iler's letter dated July 4, 1983, which is referred to in paragraph 13 of our preliminary decision dated October 31, 1983 in this matter, that referral is erroneously described as having occurred on March 1, 1983.) However, the complainants have not established on the balance of probabilities that the Union contravened section 69 in making that referral. Alberto D'Andrea, who is not related to Rocco or Dan D'Andrea, was referred to that employer pursuant to Article 3.01(b) of the (1982-84) Provincial Agreement, which provides:

The Employer shall have the right to name hire one foreman per project, providing such foreman is a member in good standing of the Local Union having jurisdiction over the area and the employee is registered on the Local Union unemployment list.

That this referral was indeed a valid name hire was confirmed not only by the candid and credible evidence of Tony Sproviero, who at the time of the referral was a member of the Local's Executive Board and was also one of its business representatives, but also by the following letter which was delivered to Rocco D'Andrea prior to the impugned referral, and taken into account by the Executive Board in concluding that the Company was entitled to name hire Mr. D'Andrea:



In accordance with the provisions of Art. 3.01 (b) of the Provincial Collective Agreement, please be advised that we wish to name hire Mr. Alberto D'Andrea as Labourer General Foreman at our Suncor Project commencing 7:30 a.m. Wednesday, March 16, 1983.

We, therefore, request you issue the necessary referral slip as required by Art. 16 of the L.U. 1089 Schedule to the Collective Agreement.

Sincerely,

(signed) "D. Butt"  
Mgr. Industrial Relations

53. Abraham Frederick registered on the list on March 22, 1983 and was referred to Plibrico (Canada) Limited on March 25, 1983. Mr. Marinaro was not offered that referral, although he was above Mr. Frederick on the list, having registered on November 19, 1982. Ms. Iacobelli testified that Virginia Mauri, the clerk who performed the paper work concerning that referral, had told her that Mr. Frederick had been referred to Plibrico by mistake, as a result of Ms. Mauri's failure to strike Mr. Frederick's November 9, 1982 registration from the list when he was referred to work on December 6, 1982 pursuant to a recall by INS-CO. Ms. Mauri, who apparently left Sarnia when her husband was transferred to another location (that was not identified in the evidence), was not called as a witness in these proceedings. While it is possible that this out-of-turn referral was the result of simple inadvertence which would not fall within the ambit of section 69, in the context of a case such as the present one in which the complainants have established a pattern of conduct which violates section 69 of the Act we are not prepared to accept that characterization of this out-of-turn referral on the basis of hearsay evidence from a witness whose evidence we have found to be unreliable even with respect to a number of matters of which she had firsthand knowledge. Thus, we find that the *prima facie* case established by this out-of-turn referral in the context of the aforementioned pattern has not been rebutted.

54. Counsel for the complainants argued that the job order book (Exhibit 29) indicated that Gino Iacobelli, who was #958 on the list, was called at 7:30 a.m. on May 6, 1983 in respect of a job referral, while Mr. Marinaro, who was ahead of him on the list, was not called until 2:00 p.m. that day (concerning another referral). However, in view of the fact that the referral slip (number 17250) given to Mr. Iacobelli in respect of that job specifies 7:30 as the time at which he was to report for work, it appears more likely that, as suggested by Anna Iacobelli, the "7:30" notation in the job order book refers to the starting time of the job and not to the time at which Mr. Iacobelli was called by the Union. Thus, no violation of section 69 of the Act has been proved in respect of that referral.

55. We have also concluded that the complainants have not established on the balance of probabilities that on May 6, 1983 Dave Moscone (who was #959 on the list) was called before Mr. Marinaro (who was #955). While the Union's records appear to indicate that Mr. Marinaro was called at 2:00 p.m. that day, we are unable to determine from those records, or from any other evidence adduced in these proceedings, the time at which Mr. Moscone was contacted that day. While this provides a further example of the inadequacy of the hiring hall records that were being kept at that time, it does not establish a contravention of section 69 of the Act.

56. In summary, we have concluded, for the reasons set forth above, that the following

23 referrals involved contraventions of section 69 of the Act, in respect of which Mr. Marinaro is entitled to be compensated by the respondent trade union for lost wages and benefits:

Jaime Lopes to Collavino on July 14, 1981,  
Alberto Michetti to Armbro on July 17, 1981,  
Joao DeMelo to Grandbar on July 23, 1981,  
Manuel Albino to Collavino on July 24, 1981,  
John Ianozzi to De Carolis on July 28, 1981,  
Peter Rocca to Collavino on August 10, 1981,  
Mike Fazzalari to Collavino on August 11, 1981,  
Kevin Glynsinski to Alznar on February 12, 1982,  
Carmine Moretta to Da Cunha on February 16, 1982,  
Vaniglio Michieli to Catalytic on March 9, 1982,  
Orlando Iacobelli to Alvaro on March 22, 1982,  
Domencis Luis to Leo-Jan Masonry on June 1, 1982,  
Manuel Dos Santos to Alznar on June 23, 1982,  
Tony D'Andrea to Alvaro on August 16, 1982,  
Anthony Belak to Eastern Construction on August 20, 1982,  
Francois Bezeau to Sartori on August 27, 1982,  
Dan Teixeira to Tempo on August 31, 1982,  
Manuel Dos Santos to Filipowich on August 31, 1982,  
Pasquale Muscedere to Alvaro on September 3, 1982,  
Gino Iacobelli to Lumus on September 10, 1982,  
Mario Savo to Chemstand on September 10, 1982,  
Clemente Cicchini to SNC Foster-Wheeler on March 25, 1983, and  
Abraham Frederick to Plibrico on March 25, 1983.

However, for the reasons set forth above, we have concluded that no violation of the Act has been established in respect of the remainder of the referrals impugned by Mr. Marinaro.

57. As indicated above, Mr. Marinaro has also alleged that he was laid off by D. W. Rankin on July 7, 1981 at the direction of Rocco D'Andrea. However, the evidence indicates that Rocco D'Andrea had nothing to do with that layoff. Indeed, it is clear from the testimony of Mr. D'Alessandro, who was Mr. Marinaro's foreman on that job, that it was Mr. D'Alessandro who selected Mr. Marinaro for lay-off, on the basis that Mr. Marinaro was less productive than the other persons on his crew due to his propensity to leave the work area in order to temporarily escape the strong odour emitted by a nearby plant.

58. Having dealt with all of the referrals impugned by Mr. Marinaro, including four of the six referrals challenged by Mr. D'Alessandro, we shall now return to the two remaining referrals that are challenged only by Mr. D'Alessandro. The first of these is the Union's referral of Aldo Rocca to MHG-DB-Catalytic on October 18, 1982. Mr. Rocca had registered on the list as #670 ten days prior to that referral. At the time of Mr. Rocca's referral, Mr. D'Alessandro was #629 on the list, having registered on September 30, 1982. The Union has not provided any explanation as to why that referral was made out of sequence of registration. Although an isolated instance of an out-of-turn referral might not establish a *prima facie* case, the impugned referral is not an isolated instance, but rather is but one of several instances which have been found to involve contraventions of section 69 in respect of Mr. D'Alessandro. Having regard to all of the evidence, we are satisfied that in the absence of any explanation by the Union, it is reasonable to infer in the circumstances of this case that this out-of-turn referral is another in which Mr. Alessandro has been dealt with by the Union arbitrarily, discriminatorily, or in bad faith, in contravention of section 69.

59. The final referral challenged by Mr. D'Alessandro was that of Peter Vani to Foster Wheeler on September 15, 1983. As noted by counsel for the respondents in his written submissions to the Board, that referral is the only one of the many referrals challenged in these proceedings which involves the application of the following written hiring hall rules that, with the exception of rule #15, were adopted by the membership on May 12, 1983, after being placed before them by the Executive Board for "explanation, discussion and adoption, with or without amendment", pursuant to the Board's order in the *Joe Portiss* case (which order will be set forth later in this decision):

1. It is each member's responsibility to keep himself informed as to the availability of work through the Union Office and to ensure that the Union has accurate and up to date records of his address and telephone number where he can be reached for a job referral;
2. Members shall be entitled to be referred to jobs which are covered by the hiring hall clauses in the various collective agreements with or binding upon the Union in the order of their registration on the out-of-work list, save and except where otherwise provided by these Rules;
3. The Union will attempt to contact a member for up to a maximum of two hours for referral to a job. If the Union is not able to contact that member within such period of time, the member will be considered "not available" and his name struck from the out-of-work list. A member who has been considered not available may, upon his request made in person, have his name placed on the bottom of the out-of-work list;
4. A member who refuses a job without just cause will have his name struck from the list



and must wait seven (7) regular days before he is able to request that his name be placed on the bottom of the out-of-work list and such request must be made in person;

5. Job orders placed by Employers on the basis of classifications or skills set forth in the Union's various collective agreements will be treated specially by the business manager or his delegate in that the manager or his delegate will only refer members or prospective members possessing, to the best of the manager's or delegate's knowledge and belief, the specific classification or skill required by the Employer. Rules 3 and 4, above, shall not apply to such job orders placed on the basis of classifications or skills. It is each member's responsibility to see to it that his special skills or classifications are registered next to his name at the time of placing his name on the out-of-work list. The business manager or his delegate may disallow any member's claim to possess skills or classifications if he is satisfied that the member does not truly hold such skills or classifications;
6. Subject to Rules 4 and 9, any member who is referred to a job(s) which lasts less than forty (40) accumulative hours will be placed back on the top of the out-of-work list in the event that he reports back to the Union office within twenty-four (24) hours from the time he worked at the job to which he was referred and satisfies the Union that such termination of employment was due to shortage of work;
7. Any member who cannot work due to illness or injury when called by the Union for a referral must provide the Union with a certificate from his physician verifying the reason why he cannot work. Before a member is eligible for a referral to employment, he must furnish the Union with a doctor's certificate verifying that he is now willing and able to work. After waiting seven (7) regular days, upon presentation of a doctor's certificate, the member will then be so referred to work by the Union or so soon thereafter as work becomes available;
8. A member accepting a job referral slip and then failing to report to work as directed without just cause will be considered as having quit the job;
9. A member who quits, requests lay-off or who is fired for just cause, regardless of the member's length of employment with that employer, will be subject to a seven (7) regular day waiting period before he can request the Union to place his name on the bottom of the out-of-work list and such request must be made in person;
10. The seven (7) day waiting periods referred to in Rules 4 and 9, above, shall only apply when there are less than 100 members registered on the out-of-work list;
11. A member who abuses the referral system by giving or selling his referral slip to another member or person will be disqualified from further job referrals for a period of at least three (3) months and may be subject to further disciplinary action as and when recommended by the Executive Board of the Union;
12. The business manager may grant variances, tolerances or exceptions from any of the specific provisions of these Rules if he is satisfied that the same is necessary to accomplish an object or purpose of the Union. By way of example, the business manager may refer a member or a prospective member to employment or move or transfer members from job to job in order to accomplish an object or purpose of the Union, without regard to whether such member is registered on the out-of-work list or to his position on such list;
13. A member who obtains a job referral slip by falsifying employment information will be disqualified from receiving job referral slips for a period of three (3) months and will be subject to disciplinary action as and when recommended by the Executive Board;
14. Unemployed elected officers of the Local Union may have preference for job referrals without regard to their position on the out-of-work list;
15. An unemployed member who is out of work for a period of at least twelve (12) months

and who has exhausted his unemployment insurance benefits may receive preference for a job referral without regard to his position on the out-of-work list;

16. A member shall be entitled to recall by his employer to employment or to be name-hired by an employer in accordance with the terms of the applicable collective agreement without regard to his position on the out-of-work list;
17. Actions taken by the Union in pursuance to any provisions in any present or future applicable collective agreements shall supersede any of the above-mentioned Rules.

(Rule 15 was referred back to the Executive Board by the membership at that meeting.)

60. The evidence adduced before us in these proceedings indicates that in accordance with Rule 2, Mr. Vani, who registered on the list as #348 on February 21, 1983, was referred by the Union to Canadian Asbestos Covering on August 29, 1983 when his number came up on the list. Since that job lasted for less than forty hours, he was placed back at the top of the list pursuant to Rule 6, and was referred back to Canadian Asbestos Covering on September 7, 1983 when a further order for labourers was received by the Union from that employer. When he arrived at the job site, he refused the job (which involved bringing sixteen foot lengths of lumber to a carpenter) because he was experiencing back pains which prevented him from doing that work. When he returned to the Union hall, he was told that his name would be put at the bottom of the list unless he produced a medical certificate. Mr. Vani, who told the Board that he knew this to be "law of the Union" because it had been discussed at Union meetings, then went to his physician, Dr. A. W. Canning, who provided him with the following medical certificate:

To whom it may concern:

Re: Peter Vani.

This is to certify that the above patient has been under my care recently suffering from back pain and is unable to return to work until Sept. 9, 1983.

Mr. Vani then returned to the Union office with that certificate. Following a seven day waiting period, he was referred to Foster Wheeler on September 15, 1983, pursuant to Rule 7. The work which he performed at that location consisted of general cleanup and assisting a carpenter by carrying some 2 x 4's and other lumber. Having regard to all of the circumstances, we find that Mr. Vani's September 15, 1983 referral was made in accordance with the rules adopted by the membership on May 12, 1983, and did not involve any violation of section 69 of the Act.

61. In summary, we have concluded, for the reasons set forth above, that of the six referrals challenged by Mr. D'Alessandro, three involved contraventions of section 69 of the Act by the respondent trade union vis-a-vis Mr. D'Alessandro (namely, the referral of Gino Iacobelli to Lumus on September 10, 1982, the referral of Aldo Rocca to MHG-DB-Catalytic on October 18, 1982, and the referral of Clemente Cicchini to SNC-Foster Wheeler on March 25, 1983). To remedy those violations, the Union will be directed to compensate Mr. D'Alessandro for the wages and benefits which he lost as a result of those contraventions of the Act. The quantification of those losses must, of course, take into account various contingencies, including the likelihood of Mr. D'Alessandro refusing one or more of those referrals, or being physically unable to perform the work in the event that he accepted one or more of the referrals.

62. As indicated earlier in this decision, in *Joe Portiss*, [1983] OLRB Rep. July 1160, another panel of the Board found that the Union had engaged in arbitrary and discriminatory referrals to employment in the administration of its hiring hall contrary to section 69 of the Act, and granted a broad remedial order, which included the following relief:

• • • •

(3) Local 1089 and its officers shall cease forthwith from the administration of the hiring hall's out of work list in any way that is arbitrary, discriminatory or in bad faith.

(4) The executive committee of Local 1089 shall forthwith prepare a written list of hiring hall rules. Such list of rules shall be presented for explanation, discussion and adoption, with or without amendment, by the general membership of Local 1089 within 90 days of the date of this order.

(5) A copy of the hiring hall rules so adopted, as amended from time to time, shall be permanently posted in the hiring hall and a copy of the rules, as amended from time to time, shall be provided to each member within 10 days of their approval by the general membership.

(6) At the next general meeting of the Local a committee on classifications, comprising no less than five members elected from the general membership, shall be established. It shall, within ninety days thereafter, recommend to the general membership a list of specialized job classifications as well as rules governing the determination of qualifications for registration on the out of work list under such classifications. It shall also recommend procedures for applications by members for admission to the classifications established. The classifications, standards and procedures so recommended shall be adopted, with or without amendment, by the general membership. The classifications, standards and procedures so approved shall be permanently posted in the hiring hall and copies, as amended from time to time, shall be provided to each member of Local 1089.

(7) The respondent Local 1089 and the complainant shall, within 30 days of this order, meet and agree upon the selection of a person or firm licensed under the *Public Accountancy Act* or a firm whose partners are licensed under the Act. The person or firm agreed upon shall not be from Sarnia and shall not have any other contractual relation with Local 1089 or any other local of the Labourers International Union of North America. The auditor so selected shall, at the expense of Local 1089, be retained for a period of two years to audit, on a periodic basis, the administration of the hiring hall rules and procedures, including job referrals. The auditor shall be given full access to all hiring hall documents maintained by Local 1089, as well as to such other sources of information as may be necessary for the purposes of the audit. The auditor shall report to each regularly scheduled meeting of the general membership, and be available to answer the questions of members respecting any matter relating to the administration of the hiring hall list and job referrals. In the event that the parties are unable to agree on the selection of an auditor they shall, within 45 days of the date of this order, each submit three names proposed by them to this Board and the Board shall then select an auditor from among the names submitted.

(8) Copies of the out of work list, with entries of all referrals, shall be posted in the hiring hall in a clear and legible manner. A companion list of employer requests for referrals shall also be posted, including entries of members who are referred under each request. The two lists shall be so maintained and revised from time to time as to allow all members to know their place and the place of others in the order of the list and to be aware of all referrals, including the dates of referrals, the employer to whom a member is referred and, where applicable, any special classification of employee requested or dispatched.

(9) Within 90 days of the date of this order, the executive committee of Local 1089



shall make recommendations to the general membership for the establishment of a list of injured or partially disabled members with a view to devising a system for the referral of such members, without penalty or discrimination, to jobs which they are reasonably able to perform. Any rules adopted in relation to those recommendations shall be posted in the hiring hall and copies of the rules, as amended from time to time, shall be provided to each member of Local 1089.

(10) The respondent Local 1089 of the Labourers' International Union of North America shall post forthwith copies, in English and Italian, of the attached notice marked "Appendix", duly signed by its business agent, in conspicuous places at its hiring hall in Sarnia, including all places where notices to members are customarily posted, and shall keep these notices posted for 90 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material.

(11) Copies of the Constitution and By-Laws of Local 1089 and of the Labourers' International Union of North America shall be made available, at no cost, to all members requesting copies of same at the union's hiring hall. Copies of the Constitution and By-laws shall be kept at the hiring hall in sufficient numbers to satisfy such reasonable requests for copies as are made by members from time to time.

(12) The respondent shall forthwith compensate the complainant, Joe Portiss, for all wages and benefits lost as a result of its violation of section 69 of the *Labour Relations Act*.

63. The evidence adduced before us indicates that, for the most part, that order has removed the veil of secrecy under which the hiring hall formerly operated, and has created a situation in which the membership have access to the hiring hall rules and other pertinent information concerning the manner in which the hiring hall is being operated by Local 1089. Moreover, there is no evidence that the Union's hiring hall has been operated in a manner which contravenes section 69 of the Act at any time following the issuance of that order.

64. The relief requested by the complainants initially included the removal of Rocco D'Andrea from the position of Business Manager of the Local. However, by letter dated June 13, 1985, counsel advised the Board that this claim for relief had been eliminated, as Mr. D'Andrea had been defeated in the Local's June 5, 1985 election. (We do not find it necessary or appropriate to comment on the other matters referred to in that letter.)

65. Counsel for the complainants has asked the Board to award costs to his clients. That request was opposed by respondents' counsel, who noted that his clients were not asking for costs in the event that the complaint was dismissed. In rejecting a similar request by a complainant in *Silknet Limited*, [1983] OLRB Rep. Nov. 1913, the Board wrote, in part, as follows:

8. We are not entirely unsympathetic to the complainant's concern, for we recognize that a party may well have to expend substantial sums in connection with proceedings under the *Labour Relations Act*. Moreover, there is something to be said for the argument that if one can obtain costs upon the vindication of private law rights, the measure of compensation for the successful assertion of public rights guaranteed by statute should be no less generous. However, there are a number of difficulties with this superficially attractive proposition. In the first place, costs are not dealt with explicitly in the statute, with the result that it is arguable that the Board has no jurisdiction to award costs except as a part of the compensation award flowing from a finding of a statutory violation. Thus, there may be no authority to compensate a party respondent which has successfully resisted or defended against a claim. And how should one deal with a situation in which, from a practical or legal stand point, success is divided? The law of costs in the civil process is both technical and complex, and there are good policy

reasons why it should not be readily imported into a law of collective bargaining which has survived without it for forty years and which the laymen who operate within the system and regularly appear before the Board have some difficulty understanding as it is. Finally, while it is tempting to suggest that flagrant or egregious violations of the statute should result in a "make whole" remedy in which the aggrieved party is compensated for the costs of the proceedings, it is much less clear how one would distinguish an "ordinary" violation of the statute from a "flagrant" one or a frivolous assertion from one which is arguable but ultimately rejected. It is one thing to suggest that a serious breach of the *Labour Relations Act* may trigger special remedial considerations or call for ingenuity in fashioning the appropriate remedy; it is quite another to suggest that an "ordinary" breach of the Act yields one level of compensation while a "serious" one warrants a higher level of compensation. Such an approach would begin to look "penal" rather than "compensatory" (and see sections 96 - 99 of the Act which are expressly penal in character).

See also *John Glykis*, [1985] OLRB Rep. March 420; *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755; and *Radio Shack*, [1979] OLRB Rep. Dec. 1220, at page 1271. In addition to the compelling policy reasons set forth in those decisions for not awarding costs in respect of complaints under section 89 of the Act, the complainants' mixed success in the present case also militates against an award of costs.

66. For the foregoing reasons, the Board finds that the complainants have been dealt with by the respondent trade union contrary to section 69 of the Act, and hereby orders the respondent trade union to compensate the complainants for their respective wage and benefit losses.

67. The Board remains seized for the purpose of dealing with any issues which may arise concerning the quantification of that order.

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**1705-85-R** Olga York, Applicant, v. Service Employees Union, Local 183, Respondent, v. **Gardiner's Supermarket Limited**, Intervener

Practice and Procedure - Termination - Petition and Form 17 filed in timely fashion but form not containing proper description of bargaining unit - Amendment describing two units sent after open-period ended - Whether application timely - Whether terminal date extended

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *F. W. Murray* and *S. O'Flynn*.

**APPEARANCES:** *Olga York, Judy Dainard, Harry Williams* and *Melvin Kleinsteuber* for the applicant; *G. Charney, Q.C., D. Burshaw, W. Love* and *Cindy Willsie* for the respondent; *K. W. Kort* and *G. Gardiner* for the intervener.

**DECISION OF THE BOARD;** December 10, 1985

1. This application for a declaration to terminate the bargaining rights of the Service Employees Union, Local 183 ("the union") came before the Board for hearing on December 2, 1985. The Board received submissions from the parties on some preliminary issues, including a motion by the union that the application was not timely and ought to be dismissed. The Board rendered the following oral decision at the hearing:

For reasons which will be given later in writing, the Board finds this application to be a timely application for a declaration to terminate the bargaining rights of the respondent trade union for the employees of the intervener in two separate bargaining units, one of full-time employees and the other of part-time employees. Since proper notice of the application and this hearing has not been given to the parties with respect to the unit of part-time employees, the Board hereby adjourns these proceedings and extends the terminal date of the application to December 12, 1985, in order that new notices may be served on the parties.

The Board confirmed its oral decision in a written one which also issued December 2nd, 1985. That decision contained the following directions:

... the Registrar is directed to extend the terminal date of this application to December 12, 1985 and serve on the parties new notices of the application and hearing into it in the manner and form prescribed by the Rules of Procedure under the Act. The application is to be scheduled for hearing in Belleville, Ontario, on February 3rd and 4th, 1986 and, if necessary, continuing on February 18th, 1986 in Belleville, Ontario.

The decision herein sets out the Board's reasons for its oral decision.

2. It is undisputed that the union is the exclusive bargaining agent for two separate bargaining units of employees of Gardiner's Supermarket Limited ("the employer") at Picton, Ontario. The union and the employer take the position that those units are described in the recognition clauses of separate collective agreements between them, both of which expired on September 30, 1985. The applicant did not take any position on whether there are one or two collective agreements. Whether the document which the parties are relying on is in fact one



or two collective agreements, it supports their agreement that there are two separate bargaining units. Clause 2.01 of Article 2 - Scope and Recognition of the main part of the document describes the unit of full-time employees in the following manner:

The Employer recognizes the Union as the exclusive bargaining agent for all employees of Gardiner's Super Market Limited at Picton, Ontario, save and except grocery manager, persons above the rank of grocery manager, office and clerical staff, persons regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period.

Clause 1.01 of Article 1 - Recognition in Schedule "B" of the document describes a unit of part-time employees as follows:

The Employer recognizes the Union as the exclusive bargaining agent for all employees of Gardiner's Super Market in Picton, Ontario regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period save and except Grocery Manager, persons above the rank of Grocery Manager, office and clerical staff.

3. The pleadings filed prior to the hearing reveal the following sequence of events:

(1) On September 19th, 1985 a Form 17 "Application for Declaration Terminating Bargaining Rights" was filed with the Board. It names as applicant "Gardiners Supermarket Ltd. Employees". Paragraph 3 of Form 17, which requests a detailed description of the unit of employees for which the union is bargaining agent, including the municipality or other geographic area affected, is completed as follows: "Gardiners Village Centre, Gardiners Supermarket Ltd. (I.G.A.) Main Street, Picton, Ontario.". Paragraph 4 has been completed to show that there were approximately 38 employees in the unit so described. The form is signed for the applicant by "Olga York". The form was accompanied by a covering letter dated September 19th, 1985 bearing the same signature "Olga York" as the form followed by "& Employees of Gardiners Supermarket Ltd.". The first paragraph of the letter reads as follows:

Enclosed you will find a copy of signatures from the staff of Gardiners Supermarket Ltd. which is a petition to decertify the Service Employees Union Local 183. Also enclosed you will find a list of full and part-time employees.

A petition bearing 32 signatures and two separate lists of employees names, one identified as full-time and the other as part-time, were included with the covering letter.

(2) On October 8th, 1985, the Board received by certified mail postmarked October 4th, 1985, an undated letter from Olga York signed in the same manner as the September 19th letter, the text of which is as follows:

In response to our telephone conversation on Sept. 25/85 I am sending a list of amendments you require.

Applicant is Olga York.

Applicant applies to Ontario Labour Relations Board under section 57(2a). #3 Detailed description of the unit of employees for which the respondent is the bargaining agent is:

The Employer recognizes the Union as the exclusive bargaining agent for all employees of Gardiners Super Market Ltd., at Picton, Ontario, save and except grocery manager, persons above the rank of grocery manager, office and clerical staff, persons regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period.

I hope this is all the information required to complete our application for decertification. I'll be looking for a reply. Thank you.

(3) On October 11th, 1985, the Board sent a "Notice of Application for Declaration Terminating Bargaining Rights and of Hearing" to the union and the employer and directed the employer to post copies of a "Notice to Employees of Application for Declaration Terminating Bargaining Rights and of Hearing". That notice describes the bargaining unit covered by the application in the identical terms used by York in her letter in item 2 above. The notices to the union, employer and employees set October 21st, 1985 as the terminal date for the application. The Board also sent a copy of York's undated letter to the union and the employer. A "Notice of Fixing Terminal Date and of Hearing" was sent to York at the same time as the notices to the other parties.

(4) On October 17th, 1985, the Board received a letter dated October 12th from York bearing the same form of signature as the earlier two letters. The first two paragraphs of her letter read as follows:

After I sent out the detailed description of the unit of employees for which the respondent is the bargaining unit I realized that the employees are made up of two (2) bargaining units, one for full time and one for part time employees. Also the recognition is found in two (2) separate places in the contract which I didn't know this. I thought it was all one unit until I read the contract more thoroughly. Even during a strike vote it was all classed as one unit. I have not received any information concerning the application for decertification so I'm sending the second (2nd) recognition for the part time unit as they want decertification at the same time as the full time employees. Recognition for part time employees is as follows.

The employer recognizes the Union as the exclusive bargaining agent for all employees of Gardiners Super Market in Picton Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except Grocery Manager, persons above the rank of Grocery Manager office and clerical staff.

(5) On October 18th, 1985, the Board received another letter from York dated October 16th, 1985 which appears to be in response to the Board's notice respecting the terminal and hearing dates. The letter had been sent by registered mail, special delivery on October 17th. The text of the letter, amongst other things, describes again the two bargaining units and it was accompanied by another petition containing 34 signatures.

(6) On October 21st, 1985, the Board received a letter from the

employer's solicitors accompanied by, amongst other things a formal intervention in the application and lists of employees. The text of the letter, together with the lists, identifies precisely the employees whom the employer considered to be full-time and part-time employees. The letter also draws to the Board's attention the fact that the letter from York described in item 2 above refers only to the unit of full-time employees while the employer claims to be bound to a collective agreement with the union for part-time employees as well. The employer's letter requests the Board to clarify with the applicant which unit or units the application covers.

(7) On October 22nd, 1985, the Board received the union's reply to the application together with a covering letter, both dated October 18th. The two bargaining units described in the reply as being the ones for which the union has bargaining rights are the same as those described in York's October 16th letter.

4. At the hearing, York advised the Board that she wished her application to be processed as an application to terminate the bargaining rights respecting both units of employees. Accordingly, she requested the Board to adjourn the proceedings, extend the terminal date for the application and serve proper notice to the effect that the application applies to all employees of the employer in the full-time and part-time units. Neither the employer nor the union took a position on her request. Union counsel, however, moved that the Board dismiss the application as being untimely pursuant to section 57(2)(a) and section 61(2) of the Act.

5. Union counsel acknowledges that the Form 17 was filed in a timely fashion, but contends that it was incomplete because it failed to describe any bargaining unit at all as required by paragraph 3 of the form. Counsel points out that, while York sought to correct that omission by later correspondence, she did so after September 30th, 1985. By that time, the "open period" for making any application to terminate bargaining rights had expired. As a consequence, counsel argues, the Board did not have before it a valid application within the time limits set by section 57(2)(a) and section 61(2) of the Act. In effect, counsel argues, that York was attempting to perfect a faulty application after the period for filing applications had closed and the Board should not allow her to do so. According to counsel, the fact that the application does not describe any bargaining unit is not simply a technical fault, it is a failure of the application to identify on its face the employees intended to be covered by it.

6. Union counsel, in relying on its argument that the application was not perfected in a timely fashion, acknowledges that he may be swimming against the current of the Board's decisions. In this respect, he referred the Board to its decision in *M. G. Burke Investments Ltd.*, [1978] OLRB Rep. June 549. The applicant in that case had sought to apply for a declaration terminating bargaining rights by a letter and accompanying petition, but without the proper application form. The letter and petition were timely. The Registrar acknowledged receipt of them, but pointed out that the Rules of Procedure under the Act required that applications for termination of bargaining rights be made on a specific form and enclosed a supply of the form. By the time the applicant had filed the completed form, the open period for making the application had lapsed. The respondent trade union took the position that the application had been made when the proper form was filed. The Board disagreed, finding that



the letter and the petition together contained all of the information required by the form, the Act and the Rules of Procedure, thus the respondent trade union's interests therein were not prejudiced by any defect in form.

7. Union counsel herein points out that the instant application may be distinguished from that case because the Form 17 and petition do not identify the bargaining unit or units affected by the application and, therefore, does not contain all of the essential information. Counsel also relies on the Board's decision in *Clive R. Dyker v. Retail Clerks International Association, Local 205*, [1971] OLRB Rep. August 475. The Board in that decision dismissed an application to terminate bargaining rights respecting a part-time bargaining unit. The application had been made by an employee in the full-time unit and was supported by a petition clearly referring to employees in the part-time unit. That case does support a strict, literal interpretation of what is now section 57(2) of the Act to mean that the party or parties named as applicant in the style of cause of the application must be from the bargaining unit affected by the application.

8. The Board's later decisions reveal it to have taken a far less technical approach. See, for example, *R. Forget and a Group of Employees and Retail Clerks Union, Local 486 and Dominion Stores Limited*, Board File No. 18379-70-R referred to in paragraph 6 of *Dyker v. Retail Clerks*, *supra*; *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434; *St. Michael's Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023; *Thomas Construction (Galt) Limited*, [1982] OLRB Rep. Nov. 1727; and, *Cara Operations Limited (Retail Stores Division)*, [1984] OLRB Rep. Oct. 1378. A fair reading of those cases reveal different fact situations than the instant case, but they also reveal clearly that the Board looks beyond the mere form of the application to its substance, and, as it did in *Thomas Construction*, *supra*, it may rely on section 84 of the Board's Rules of Procedure which states:

No proceeding under these Rules is invalid by reason of any defect in form or of any technical irregularity.

See also the Board's decision in *Genwood Industries Ltd.*, [1976] OLRB Rep. Aug. 417. The Board in that case had been asked by the respondent trade union to dismiss an application for termination of bargaining rights because, according to the union, it was deficient in form. In dismissing the motion, the Board commented as follows at paragraph 7:

... It is the duty of this Board to concern itself with the substance and not merely the form of documents tendered in support of an application for the termination of bargaining rights. It may be that in some cases the wording of such documents may be so inadequate as to cause this Board to dismiss the application upon a preliminary motion. This is a question that falls to be determined within the particular circumstances of each case.

9. The "particular circumstances" of the instant case are that, prior to September 30th, 1985, the date when union counsel contends, without contradiction by the other parties, that the open period had expired for making an application to terminate bargaining rights, the Board had in front of it the Form 17, together with a covering letter and two lists of employees, one part-time and one full-time. The Form 17 shows the applicant to be: "Gardiners Supermarket Ltd. Employees". The application does not describe a bargaining unit in the language or terms by which they are usually described. Instead, the application uses the words "Gardiners Village Centre, Gardiners Supermarket Ltd. (I.G.A.), Main Street, Picton, Ont.". In paragraph 4 of the form, the applicant states that there are 38 employees in the group

described in paragraph 3. That information was sufficiently incomplete to cause the Board not to process the application immediately. When it was ultimately processed, the union filed a reply in which it claims to represent approximately 40 employees of the employer at the location identified in the application. In retrospect, therefore, the way the applicant was originally named in the application, together with the information in paragraph 3 of the application and the number of employees make it clear on the face of the application that it was intended to cover all of the employees of the employer for whom the union holds bargaining rights. When the Form 17 is read together with the letter and the two lists of employees which accompanied its filing it becomes patently clear that the application was intended to cover all employees for whom the union holds bargaining rights. Therefore, as of September 19th when the application was made and as of September 30th when union counsel contends that the open period for making applications had expired, it is clear that the application had been made respecting all full-time and part-time employees represented by the union. What was lacking was a description of the bargaining unit or units and that is the flaw which union counsel argues the applicant should not be allowed to repair after expiry of the open period.

10. The Board disagrees, to do so clearly would be to ignore the substance of the application in favour of its form when the Board's decisions show it to be concerned with the substance of the applications which come before it and not merely their form. In *Thomas Construction, supra*, the Board was dealing with a fact situation where the Form 17 had been filed almost three months after the end of the open period, but where the Board had received a letter from the applicant shortly before the expiry of the open period which conveyed the wish that the letter be taken as an application for decertification of the union. The letter contained no reference to any bargaining unit, that information being provided only when the Form 17 was filed three months later. The applicant in that case was faced with a substantially more complex problem in identifying what bargaining rights were held by the trade union than is the case here, but the decision does stand for the fact that the Board has allowed a timely application to be perfected after expiry of the open period. The Board's approach in that case demonstrates, without expressing, the realization that applications of this sort frequently are brought by rank and file members of the bargaining unit who are unfamiliar with the niceties of pleadings and usually unrepresented by legal counsel. In such circumstances, for the Board to adopt such a "forms of action" approach as argued here by union counsel would, to use the Board's words in *Genwood, supra*, "... be unrealistic and would frustrate the intentions of the Act."

11. Therefore, having regard to the fact that the instant application as filed clearly was intended to cover all employees of the employer for whom the union held bargaining rights, the Board is not prepared to dismiss it as proposed by union counsel because it failed to define a bargaining unit of employees on its face and remained in that "flawed" condition at the expiry of the open period. In the fact situation here, where the application was filed in a timely fashion, expiry of the open period is irrelevant.

12. The Board now turns to its reasons for extending the terminal date and serving new notices on the parties. The Board did not send to the other parties a copy of the Form 17 or the September 19th covering letter when they were first received. Instead, it appears from the applicant's undated letter which was received by the Board on October 8th (see item 2 in paragraph 3) that a Board clerk had communicated to York the fact that the application did not contain an explicit description of the bargaining unit that it was intended to cover. In view

of the contents of the undated letter, it is not surprising that the Board treated it as a request to amend the application to make Olga York the applicant and to have it apply to the bargaining unit described in the letter, that is, the full-time unit. It was at that point when the Board commenced processing the application pursuant to the Rules of Procedure, sent notice to the parties and arranged to have the employer post the Notice to the Employees, which notices all indicated that the application had been made with respect to the full-time unit. After that had been done, the Board received York's letter dated October 12th which states clearly that the application was intended to cover the part-time unit as well. Unfortunately, the Board did not treat that letter as a request for leave to amend the application to include the part-time unit, although it did send copies of the letter to the other parties. The Board's usual practice in similar circumstances, that is, when a request is made sufficiently prior to the date of hearing into an application to amend the application, is to issue a decision extending the terminal date of the application and directing the Registrar to reprocess it. That procedure has the effect of retaining the original date of the application, but allowing the Board to serve the parties with fresh notices of the amended application and giving the parties time to respond thereto.

13. In all of the circumstances of this case, the Board is of the view that the applicant should not bear the burden of the Board's departure from its usual procedures in processing applications. Therefore, it is appropriate to redress the effects of that departure by adjourning these proceedings, extending the terminal date and serving the parties and employees with new notices clearly setting out the two bargaining units which York intended the application to capture.

14. It is for these reasons that the Board issued the oral decision set out above and made the directions in the decision which issued December 2, 1985 also referred to above.

15. This panel of the Board is not seized with this application.

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**2776-84-R United Food and Commercial Workers Union, Local 409, Applicant, v. Hudson's Bay Company, Respondent**

**Bargaining Unit - Evidence showing community of interest of salesmen more closely aligned with warehouse employees than with office - Board departing from normal policy and including salesmen in industrial unit**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *J. A. Ronson* and *W. F. Rutherford*.

**APPEARANCES:** *Ian E. Reilly* for the applicant; *Barry Brown* and *Tom Oleson* for the respondent.

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; December 20, 1985**

1. The Board, differently constituted, issued a decision in this application for certification February 5, 1985. Paragraph 4 of that decision sets out a description of a bargaining unit which represents the partial agreement of the parties as to what constitutes an appropriate unit of employees for purposes of collective bargaining. The description reads as follows:

All employees of the respondent in its Hudson's Bay Wholesale Division in the City of Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor, office staff.

The parties were disagreed as to whether three different categories of employees should be included in or excluded from the bargaining unit. These categories are: part-time employees and students employed during the school vacation period; persons classified as salesman (including one described as office coffee salesman); and, persons classified as fillers. There were no part-time employees or students employed at the time the application was made, but the respondent claims that there is a history of employing such persons and, therefore, these categories should be excluded from the bargaining unit. There were four salesmen, including the office coffee salesman, and three fillers employed at the time of the application. The respondent claims that those two categories should be included in the bargaining unit on the grounds that they share a community of interest with the employees whom the parties agree should be included in the unit. The applicant contends that there is no history of employing part-time employees and students during the school vacation period, so they should not be excluded from the bargaining unit. With respect to salesmen and fillers, the applicant takes the position that they do not share a community of interest with the other employees who would be included in the bargaining unit and, therefore, should be excluded from it. As a result of the parties' disagreement, a Board Officer was authorized to conduct a record check of the respondent's employment records and to inquire into the community of interest, if any, between the persons classified as salesmen and fillers and the other employees whom the parties agree would be included in the bargaining unit, and report to the Board thereon. The report of the Board Officer was issued to the parties and the respondent requested a hearing before the Board in order to make its submissions with respect to the conclusions it wishes the Board to make on the evidence contained in the report. Both parties were given the opportunity at the hearing to make full submissions on the report. The applicant's representative elected to rely on its written submissions previously filed with the Board. Consequently, the Board heard

the oral submissions of respondent counsel. The conclusions set out in this decision have been reached having regard to the evidence in the report of the Board Officer, the written submissions of the applicant, and the oral submissions of respondent counsel.

2. The effect of the parties' limited agreement respecting the description and composition of the bargaining unit is that the term "all employees" would include two categories of employees: warehousemen, including shipping/receiving, and delivery. Their disagreement insofar as the community of interest issue is concerned is whether the categories of filler and salesman, including the office coffee salesman, are to be included as part of the term "all employees" in the description, or specifically excluded along with supervisors and office staff.

3. It is useful to examine briefly the kind of business which the respondent conducts from its Thunder Bay branch. It operates a wholesaling business from a single office and warehouse. Its customers consist primarily of retail stores and vending machines. The office coffee sales is an adjunct of the vending operations and involves the sales of coffee and related supplies to business offices which want an in-house coffee making service. The evidence reveals that the four categories of employees comprised of: warehousemen, including shipping/receiving; delivery; vending (fillers and outside coffee salesman); and salesmen, perform their principal functions with a substantial degree of integration in order to fulfill the respondent's wholesaling operation. There is regular and significant overlap in the way in which they perform their duties.

4. Normally when the Board is confronted with wholesaling or industrial types of operations which includes sales staff, the sales staff are recognized as having a community of interest distinct from plant and warehouse employees and much more closely aligned with office staff. Recognition of this alignment of interest has caused the Board to exclude sales staff along with office staff when defining appropriate bargaining units which include production and maintenance employees. Conversely, when the Board is dealing with white collar bargaining units, it generally keeps sales staff together with office staff. The report of the Board Officer in the instant case includes detailed evidence respecting how the employees in the disputed categories perform their duties and of the relationship between the duties of a particular category of employees and all of the others, their terms and conditions of employment and the administration of the operations. The Board does not intend to set out that evidence in detail, it is sufficient to say that it points overwhelmingly in the opposite direction to the Board's usual policy. Salesmen in the instant case are clearly more closely aligned in their functions with the warehouse and delivery people on a regular basis than with the office staff. The same is true for the fillers and the office coffee salesman.

5. The evidence reveals extensive interchange amongst the four categories of employees and that the warehousemen and deliverymen are the primary source of candidates for filling salesmen and fillers jobs. The evidence also reveals two notable distinctions in terms of employment and working conditions of salesmen compared with the other three categories in that salesmen are paid by commission and have personal use of the car provided by the respondent for their jobs. Differences in conditions amongst the other three categories are minimal, particularly as between deliverymen and fillers. In the Board's view, these differences fall significantly short of bringing this case within the Board's normal policy respecting exclusion of salesmen from an "industrial type" of bargaining unit.

6. On that evidence, the Board finds that the employees classified by the respondent

as warehousemen, shipping/receiving, delivery, fillers, outside coffee salesmen and salesmen share a community of interest distinct from that of the office staff. Moreover, the evidence as a whole identifies this case as one where collective bargaining policy would be better served by not fragmenting the bargaining unit. The Board finds, therefore, that together they comprise a unit of employees appropriate for collective bargaining.

7. The evidence in the Officer's report with respect to part-time employees and students employed during the summer vacation reveals a history of students, but there is no evidence of any history of part-time employees. The parties are in dispute as to whether students and part-time employees should be excluded from the bargaining unit. The respondent submits that the Board should exclude not just the student category but the non-existent part-time category as well. The Board is not convinced that circumstances exist in this case which should cause the Board to depart from its normal policy for dealing with the exclusion of students and part-time employees. The result of applying to this case the Board's normal policy respecting students, would be to exclude them because the employer does have a history of employing them, even though none were employed at the time this application was made. With respect to part-time employees, there is neither a history of the employer having employed them nor were there any employed at the time the application was made. Therefore, the Board's normal policy as applied to these circumstances would result in part-time employees *not* being excluded from the unit. For a statement of the Board's policy and its underlying rationale, see the Board's decision in *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. Mar. 324.

8. Having regard to all of the foregoing, the Board finds that all employees of the respondent in its Hudson's Bay Wholesale Division in the City of Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

9. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 24, 1985, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. In the result, this application for certification is dismissed.

#### **DECISION OF BOARD MEMBER W. F. RUTHERFORD;**

1. In certification it has been usual board policy to exclude salesmen from an all employee unit, thereby placing salesmen with office group.

2. It is my opinion that salesmen in the instant case do not have a community of interest with the warehousemen and vending machine fillers for the following reasons.

3. The salesmen's work in the warehouse is minor, mainly that it entails picking their own customer shortages and some stock taking with all other employees.

4. The salesmen work on commission.



5. The salesmen can use the company vehicles for personal business.
  6. For all the above reasons I would have excluded the four salesmen from the unit applied for.
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**2132-85-R** Labourers' International Union of North America, Local 527, Applicant,  
v. Loremar Structures Inc., Respondent

**Bargaining Unit - Certification - Construction Industry - Union not entitled to apply under s.144(1) to represent trades in ICI sector not covered by designation - Second separate unit possible for such trades under s.144(3) - But no appropriate unit on facts as trades not employed other than in ICI sector on application date**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

**DECISION OF THE BOARD;** December 10, 1985

1. In this application for certification the applicant filed one combination application for membership and receipt. The combination application for membership is signed by the employee and the receipt is countersigned and indicates that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The applicant also filed three certificates of membership. The certificates are signed by the members and indicate that monthly dues of \$10.00 have been paid for at least one month within the six-month period immediately preceding the terminal date of the application. The certificates are checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.
2. The respondent filed a reply, a list of employees containing five names on schedule "A", but failed to file specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.
4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The applicant is seeking to be certified for a bargaining unit of employees that would be comprised of all construction labourers employed by the respondent in the industrial, commercial and institutional (ICI) sector of the construction industry in the Province of Ontario and all construction labourers, carpenters and carpenters' apprentices employed by the respondent in all other sectors of the construction industry in the Board's geographic area #15. As stated in paragraph 3 above, the applicant is an affiliated bargaining agent of the designated employee bargaining agency named therein. That agency is designated to represent construction labourers in the ICI sector of the construction industry in the Province of Ontario. It is not designated to represent carpenters and carpenters' apprentices in that sector. Nor is the applicant seeking to be certified for carpenters and carpenters' apprentices in the ICI sector. The problem arises, however, with the requirements of section 144(1) of the Act under which the applicant has brought its application. It prescribes that an application which relates to the ICI sector be described to include all employees who would be bound by a provincial agreement (that is, those employed in the ICI sector) together with all other employees in at least one appropriate geographic area, which in this case would be the Board's geographic area #15. It is well settled law now that, whether or not the requirements of section 144(1) allow the Board to describe a bargaining unit to include trades other than those for which the applicant is designated to bargain in the ICI sector, the Board has found that it would not be appropriate to do so because of the disruptive effect that would have on the scheme of provincial bargaining set out in the Act. In this respect see the Board's decisions in *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Limited*, [1982] OLRB Rep. Nov. 1692; and *Manacon Construction Limited*, [1983] OLRB Rep. Mar. 407 and July 1104.

6. More recently, for reasons set out in the Board's decision in *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166, the Board has found that section 144(1) does not prevent it from finding more than one unit to be appropriate in proper circumstances, providing one of the units found by the Board to be appropriate fulfilled the section 144(1) mandate that the unit include all employees who would be bound by a provincial agreement. Nor is there anything in section 144(1) of the Act which would prevent the Board from treating an application of this nature as an application for two separate bargaining units as long as the Board was satisfied that the other trade or trades which the applicant was seeking to represent, in this case, carpenters and carpenters' apprentices, were employed at the making of the application in any sector other than the ICI sector. That enables the Board to treat the application for the second unit as though it had been made pursuant to section 144(3) of the Act. In such cases, the description of the appropriate bargaining unit would be determined in accordance with the principles applied under section 6(1) of the Act. In this respect, see the Board's decisions in *Aero Block*, *supra*, at paragraph 26, and *Roland Duquette Construction*, [1983] OLRB Rep. Nov. 1884, at paragraph 11.

7. The need to impose the condition that the other trade or trades *not* be working in

the ICI sector arises out of the clear wording of subsection 3 of section 144. Such applications must relate "... to a unit of employees *employed* in ... sectors of a geographic area other than the [ICI] sector ...." (emphasis added). Section 6(1), in turn, mandates that "... in every case the [appropriate] unit shall consist of more than one employee ...". Clearly, an application made under section 144(3) based solely on employees working in the ICI sector would not satisfy the requirements of that section or of section 6(1) because there would be no employees to constitute the appropriate unit. The pleadings filed with the Board in this case show that the carpenters employed by the respondent on the date of application were employed in the ICI sector. Therefore, under section 144(3), there is no unit of employees that would be appropriate for collective bargaining. For the same reasons, as expressed in *Graham Construction* and the line of cases following it, and pursuant to section 144(1), the Board further finds that a unit of carpenters and carpenters' apprentices employed in the ICI sector of the construction industry would *not* be a unit appropriate for collective bargaining purposes. Therefore, in the circumstances of this application, there is no unit of carpenters and carpenters' apprentices which would be appropriate for collective bargaining under either section 144(1) or section 144(3) of the Act.

8. Having regard to all of the foregoing, the Board finds that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

11. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant



trade union in respect of all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

12. The application is dismissed insofar as it applies to carpenters and carpenters' apprentices employed in the ICI sector.

**2097-85-U McDonnell Douglas Canada Ltd., Applicant, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) and Local 1967, William B. Patrick and Munir A. Khalid, Respondents**

Strike - Employees engaging in five minute work stoppage to protest against creation of new super-classification perceived to be contrary to collective agreement - Whether involved limitation of output to constitute strike - Whether provocation by employer or efforts of union officials to minimize extent of strike action causing Board to not exercise discretion to make strike declaration

**BEFORE:** *R. A. Furness*, Vice-Chairman.

**APPEARANCES:** *James B. Noonan, Richard J. Nixon and Brenda Kops* for the applicant; *Daniel A. Harris, William B. Patrick, Ted Murphy and Munir A. Khalid* for the respondents.

**DECISION OF THE BOARD;** December 23, 1985

1. The applicant filed an application for relief under section 92 of the *Labour Relations Act* on November 20, 1985. The application was heard by the Board on November 21, 1985, and on November 22, 1985, the Board issued the following decision:

1. The applicant has applied to the Board for relief under section 92 of the *Labour Relations Act*.

2. At the hearing the applicant requested leave to withdraw its request for relief as against the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC). Having regard to the stage at which this request was made, the Board dismisses the application for relief in so far as it pertains to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC).

3. Having regard to the representations before it and for reasons to be given in writing, the Board declares that:

I International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 1967 has called or authorized or threatened to call or authorize an unlawful strike of the employees of McDonnell Douglas Canada Ltd.

II William B. Patrick and Munir A. Khalid, as officers, officials or agents of the International

Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 1967 counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike of the employees of McDonnell Douglas Canada Ltd.

4. Having regard to the representations before it and for reasons to be given in writing, the Board makes the following directions:

- A. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 1967 shall cease and desist from calling or authorizing or threatening to call or authorize an unlawful strike of employees of McDonnell Douglas Canada Ltd.
- B. William B. Patrick and Munir A. Khalid, as officers, officials or agents of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 1967 shall cease and desist from counselling or procuring or supporting or encouraging an unlawful strike or threatening an unlawful strike of the employees of McDonnell Douglas Canada Ltd.
- C. William B. Patrick and Munir A. Khalid, as officers, officials or agents of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 1967 and all other officers and representatives of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 1967 shall take such steps as necessary and consistent with their duties as employees of McDonnell Douglas Canada Ltd. to bring the declarations and directions of the Board contained in this decision to the attention of all employees of McDonnell Douglas Canada Ltd. in the bargaining unit.
- D. Any person who has notice or knowledge of the declarations and directions of the Board contained in this decision shall cease and desist from doing or threatening to do an act that such person knows or ought to know that, as a probable and reasonable consequence of the act, another person will engage in an unlawful strike, and in particular, such person shall cease and desist from refusing to work for periods of five minutes in concert or in combination or in accordance with a common understanding.
- E. McDonnell Douglas Canada Ltd. shall forthwith post copies of this decision upon receipt thereof at the work location and shall distribute copies of this decision to all of its employees.

The decision of the Board dated November 22, 1985, was registered in the Supreme Court of Ontario on November 22, 1985.

2. The reasons for the decision dated November 22, 1985, are now set forth. The following facts are set forth from the reply filed by the respondents and the oral representations made on behalf of the respondents. The applicant and the respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) ("the union") and its Local 1967 ("Local 1967") are parties to a subsisting collective agreement. The union and Local 1967 are the bargaining agent for the employees of the applicant in Mississauga and those employees who are engaged on work parties outside Mississauga, save and except office staff, assistant foremen, those above the rank of assistant foreman, health centre staff, security staff and service engineers. William B. Patrick is the president of Local 1967. Munir A. Khalid is the plant chairman of Local 1967.

3. During the negotiations which led to the current and subsisting collective agreement, the applicant proposed that a new "super-classification" be created which would encompass

a number of the current job classifications contained in the collective agreement. This proposal was rejected by the union and its Local 1967 and was not pursued further by the applicant. On or about October 15, 1985, Paul Holub, section manager, labour relations, for the applicant, notified Mr. Khalid by letter that the letter of that date constituted notice that the applicant was introducing a new job classification pursuant to article IX, section 9 of the 1983-1986 collective agreement. An occupational summary of the job classification and its grouping was attached to the letter. This new classification was the same as the classification which had been rejected by the union and Local 1967 in the negotiations. The applicant posted a competition for the new job classification at the same time as the delivery of the letter from Mr. Holub to Mr. Khalid.

4. Local 1967 informed the applicant that industrial harmony would be best served by the removal of the job posting. Local 1967 warned the applicant that the membership would respond adversely to the applicant's continued efforts to introduce the new job classification without consultation. An initial meeting between Jim Aldridge, the director of personnel of the applicant, Mr. Patrick and Mr. Khalid failed to produce either the conduct sought by the union and Local 1967 or lead to a meeting between Mr. Holub and the Canadian Director and the international vice-president of the union. In response to the applicant's conduct of introducing the new job classification, the union and Local 1967 have availed themselves of the appeal procedure under article IX, section 9 of the collective agreement and have also filed a policy grievance under the collective agreement against the action of the applicant. On the date of the hearing, some of the respondents filed a complaint under section 89 of the Act against the applicant. The complaint alleged violations of the Act by the applicant.

5. The executive of Local 1967 took steps to keep the membership informed of the steps which were being taken by the applicant. Five leaflets were circulated to the membership during the period from October 16 to November 15, 1985. A two-page leaflet dated October 16, 1985, referred to the problems with the super classification as viewed by Local 1967. The leaflet reviewed the history of the super classification in the context of the negotiations for the present collective agreement. The leaflet accused the applicant of wanting to eliminate jobs and pointed out that the applicant is producing more work in 1985 with 3,000 people than it did in 1980 with 4,700 people. The leaflet stated that the applicant knew this would be a strike issue if it tried to introduce this type of super classification and that the applicant had tried to slip it in now. The leaflet referred to an intention to fight for job classification and job protection and that Local 1967 had called in the union. The leaflet concluded with a statement that a meeting would be called with the applicant and that Local 1967 would be getting back to the employees. The leaflet dated October 18, referred to a meeting with the applicant and stated that the position of Local 1967 was to have the applicant cancel and remove the job posting. The leaflet criticized the applicant's attitude towards the workers and accused the applicant of stonewalling on grievances.

6. The leaflet dated November 1, from Local 1967 informed the employees that the applicant had made no move to reverse its position on the super classification. The leaflet stated that Local 1967 was appealing the position of the applicant under the terms of the collective agreement and were lodging a policy grievance against it. The leaflet referred to the potential for affecting seniority in the applicant's plans to implement a flow chart for the super classification. The leaflet referred to the unsatisfactory progress in a meeting with the applicant on October 22 and referred to "word has been circulating in the plant that work will be sent out" in certain areas of the applicant's operations without attributing the word to any source.



The leaflet concluded with a statement that Local 1967 had called for a special meeting under the collective agreement and an accusation that the applicant was implementing a system just in time to avoid negotiations and was restructuring the whole work place without consultation.

7. The leaflet dated November 8, advised the employees that the applicant had posted a notice that eight employees were accepted on the super classification. The leaflet stated that "We have no choice but to respond by taking step by step measures to build pressure against the Company — pressure that will build until the Company pulls back". The leaflet went on to express concerns that the eight workers hired in the super classification would lose seniority because the classification was not covered by the collective agreement. The leaflet further stated that company profits were growing but that wages and benefits were falling behind and added that frustration and bitterness were bound to grow. The members were informed that the appeal and policy grievance have been lodged against the super classification but that was not enough. The leaflet continued that the company has shown that they will only change when pressure is applied. The leaflet concluded by stating:

We are taking some first steps in applying pressure.

1. There will be an organized *legal* demonstration *today*. We are asking the membership to participate on their *lunch periods only*. The purpose of this demonstration is the first step to let the Company know how we feel about this classification and to inform the public. *It will be held on Airport Road outside Company property.* (emphasis in leaflet)
2. There will be a special Membership Meeting on November 17, 1985 at the Skyline Hotel - Ballroom A, B & C at 10:00 a.m. when a full report will be given on the super classification and the follow-up action we will be taking. There will also be a report on jobs going out - re: Chem Mill, Rudder Assembly, Drop Hammer, etc. (The Company said on Wednesday - yes, jobs are going out - they may be coming back - but they are making no promises.)

We are looking to you for support. The Company has chosen a path of defiance and confrontation. There is only one way to respond - UNITY. UNITY now and UNITY at the next negotiations. We must be prepared.

8. The leaflet dated November 15, commenced by congratulating everyone for the great success shown at the demonstration on November 8. The leaflet stated that this was to protest the company's extreme violation and misinterpretation of the collective agreement by arbitrarily implementing a so-called new "job classification". It was added that everyone knew that the super classification could only lead to the elimination of many jobs if the company was successful in their bid to maintain it. This unfair action by the company, it was further stated, would eliminate seniority rights and job security for many workers. The leaflet concluded by stating:

"MCDONNELL DOUGLAS" BACK OFF!!!

The Company obviously felt that there would be no concern shown by the membership regarding this super classification. Together we proved them wrong again by being united against an unjust action that cannot be tolerated by the workers.

Last Friday was the first of many protests and the protests must continue in order for us to show that we are totally against such a blatant violation and unfair Labour Relation's practice.

Last Friday was successful. Let us continue this success by showing our full attendance at the Skyline Hotel on *SUNDAY, NOVEMBER 17, 1985 - 10.00 A. M.*

BE THERE UNITED

9. The special membership meeting was held at the Skyline Hotel on Sunday, November 17, 1985. Approximately 2,000 employees out of about 3,000 in the bargaining unit attended the special meeting. Many members at the special meeting expressed the desire to engage in a shutdown of the applicant's facilities. As a result of discussion, the employees in the bargaining unit who were present agreed that it would not be appropriate to engage in either a shutdown of the premises in whole or in part by walkout or concerted refusal to work overtime. As a result of a motion from the floor, it was determined that the members of the bargaining unit would engage in a protest calculated to demonstrate to the applicant the degree of their upset. The form of protest settled upon by the membership was agreed upon after considerable discussion and debate of the various avenues open to the membership to express their disgust with the applicant's conduct and to demonstrate that they had faith that the applicant would co-operate in having the matter heard in an expeditious fashion as contemplated in the collective agreement. Work stoppages of five minutes duration by employees of the applicant occurred on November 18, 1985.

10. The respondents requested that they be permitted to call evidence of facts which they believed would go to the discretion of the Board to grant the declarations sought by the applicant. The applicant opposed the request and argued that there were sufficient admissions in the reply so as to enable the Board to grant the declarations sought by the applicant. The Board made the following oral ruling at the hearing:

The applicant seeks a declaration under section 92 based upon the material before the Board without the calling of evidence. The respondents take the position that the Board, in the exercise of its discretion under section 92, ought to hear evidence going to the exercise of its discretion. The Board has a discretion in the exercise of its powers under section 92 and directs the respondents to state what their evidence would establish if it was produced before the Board by means of *viva voce* evidence.

11. The respondents informed the Board that the evidence would fall into two branches. Firstly, the evidence would put into context the problem of the super classification and its background and put it into the context of the work place. The applicant sought to negotiate for the present collective agreement and was unsuccessful on the issue of the super classification to the point of pushing the issue to the last round in the negotiations. The applicant has now unilaterally imposed the super classification. This is of great importance to the rank and file employees. The super classification was posted on October 15. On October 16 there was a wildcat strike in the plant when everyone sat down. The strike was halted by the leaders of Local 1967 and the applicant expressed its gratitude. The appeal and policy grievance procedures were then resorted to by the applicant and Local 1967. Notwithstanding Local 1967's attempt to discuss the issue, the applicant persisted in implementing the super classification. This provoked an increasingly hostile response from the employees. The applicant was not quick to get back to Local 1967 to arrange meetings to discuss the issue. Further, in response to an invitation by senior representatives of the union to meet and discuss

the situation, it took some time to receive a response from the applicant. A meeting was arranged for November 21 at 1:00 p.m. and the applicant reported that it would be unable to meet due to the hearing of the instant application by the Board. This is indicative of the provocative stance of the applicant.

12. Secondly, the respondents did all that was reasonable and responsible to try and keep the lid on things. At the meeting on November 17, 2,000 out of 2,800 employees were in attendance and the result was a very minor and measured response. The desire of the rank and file employees was for a more unlawful response. The respondents did all that they could and no direction should issue against them because they acted as responsible leaders. Most of the employees participated in the work stoppage. A measure response would be to lift the super classification until the expedited arbitration was completed. While the applicant did not agree with the accuracy of these assertions, it informed the Board that it was prepared to make representations on the discretion of the Board on the basis of these assertions. The Board proceeded on this basis and entertained the representations of the parties on the exercise of its discretion under section 92.

13. It was the position of the respondents that if the five minute protest had not been agreed upon as a vehicle for expressing the utter dissatisfaction of the members of the bargaining unit, then they would not have been able to prevent the applicant's actions from resulting in a large, widespread and spontaneous work stoppage of indefinite duration. The respondents argued that the applicant had not suffered any limitation to its output or production. While the respondents agreed that the dispute with the applicant over the super classification would be referred to arbitration pursuant to section 45 of the Act, they relied upon the denial of the grievance by the applicant on November 19, 1985, and adopted the position that the applicant was the author of its own misfortune and had come before the Board without clean hands. It was also the position of the respondents that the scheduled protests did not, in the circumstances, amount to a "strike" within the meaning of the Act. The respondents argued that, in any event, the Board ought not to exercise its discretion in granting the relief sought since it was the continued intransigent behaviour of the applicant which has resulted in and provoked the reasonable response engaged in by the members of the bargaining unit.

14. The applicant argued that it had been established that a strike had occurred, that such a strike was to be repeated on each and every Monday and that the purpose of section 92 was to preserve the *status quo* in the work place until the underlying causes could be resolved as provided for under the collective agreement and under the Act. The applicant further argued that the conduct of the respondents constituted sufficient grounds for the declarations which it sought. It was the position of the applicant that it was acting lawfully and had made it clear to the respondents that it was prepared to submit the dispute over the super classification to the appeal and policy arbitration provisions of the collective agreement and was also prepared to meet the complaint under section 89 in a further proceeding before the Board.

15. Decisions of the Board were referred to on the issue of the exercise of the discretion of the Board on the facts of this application. Of the several authorities which were referred to, *Northdown Drywall & Construction Limited, infra*, and *Canadian Elevator Manufacturers, infra*, were on point and were strongly relied upon by the respondents. The respondents argued that the Board ought not to bail out the applicant from a situation that was of its own making and relied on the decision in *Northdown Drywall & Construction Limited*, [1972] OLRB Rep.



June 666. The facts and the nature of the relief sought in *Northdown* are quite different from the instant application. In *Northdown* the Board was dealing with a complaint under section 81 [now section 91] and an issue arose with respect to the jurisdiction of the Board to entertain the complaint. The majority of the Board held that the Board did not have jurisdiction to entertain the complaint and remarked that it would not bail out an employer who had created a situation involving two trade unions which had been brought about by the employer's flagrant disregard of inconsistent contractual arrangements with two trade unions. In the instant application, the request for relief is made under section 92 and arises not as a result of two inconsistent contractual arrangements, but rather arises over a difference in the interpretation of one collective agreement - the collective agreement between the applicant and the union and Local 1967. The respondents also relied upon the decision of the Board in *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868 and argued that, as in that case, the Board ought not to exercise its discretion and grant a cease and desist direction against the respondents. In *Canadian Elevator Manufacturers* applications had been filed under sections 82, 83 and 123, respectively [now sections 92, 93 and 135]. The applications arose out of costly industry shutdowns arising out of the 1972 negotiations for a collective agreement. Legislation in the form of the *Elevator Contractor Unions Disputes Act*, 1973, S.O., c.1 required the International Union of Elevator Constructors, its locals in Ontario and five elevator companies to submit their differences to final and binding arbitration. The majority of the board of arbitration introduced a number of new provisions into the new collective agreement which was eventually decreed. The parties to the new collective agreement could not agree on the meaning to be attributed to many of the new provisions. Neither the employers nor the trade unions had filed grievances in response to their respective positions and therefore very little had been undertaken by either party in the form of rational problem-solving under the new collective agreement. At page 872-873 the Board stated:

14. Therefore, we are being asked either to provide relief to the applicant employers whose actions precipitating the dispute are, in our opinion, unsupported by a reasonably arguable interpretation of the contract or to assist a trade union who has refrained from pursuing the more rationale dispute-resolving procedures provided by the collective agreement. We decline both these opportunities and dismiss all three applications.

15. The Board's power under sections 82, 83 and 123 [now sections 92, 93 and 135] are discretionary and ought to be exercised in accord with sound principles of industrial relations. While the Board has a public obligation to foster and maintain industrial peace, it cannot be said that this obligation can only be fulfilled by the reflex-like exercise of the Board's powers under these sections. Where, as in this case, an employer deliberately embarks upon a course of action that is unsupported by a reasonably arguable interpretation of the collective agreement, thereby primarily, and we might say baldly, resting its claim on the principle that an employee is obligated "to perform first and grieve later", this Board would not be serving the public by buttressing such recklessness with the full force of the laws of this Province. We of course approve the aforementioned arbitral principle and the Board must be wary in interpreting collective agreements even on a very limited basis. But the application of the arbitral principle in discipline cases is a qualitatively different function than using it to specifically enforce the demands of an employer under the sections in question. To issue such powerful relief in the peculiar circumstances of this case could well undermine the integrity of the Board's orders and discourage the self-restraint required in a complex industrial society. Very similar sentiments, quite appropriate to this case, were expressed by the Board in *Northdown Drywall and Construction Limited* [1972] OLRB Mthly. Rep. June 666 where the majority of that panel evidenced its concern for self-government in the following way:

...We recognize that this Board has an obligation to maintain industrial peace. We recognize that there is an obligation on the industry to assist in maintaining industrial peace by conducting it [sic] affairs in an orderly and careful manner so as to avoid the tensions

and conflicts that are already rampant in the construction industry. There must be some form of self-help or policing by the industry. This Board is not to be viewed as a panacea for the ills of the construction industry. We do not sit as Solomon ever ready to divide the baby. We expect that the parties will exercise some self-restraint in their affairs and not expect this Board to be a forum which absolves them from excesses.

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17. It must be emphasized that very similar reasons of policy cause us to dismiss the trade union's application. We are of the opinion that the trade union's section 83 [now section 93] application is merely a strategic device designed to reinforce a self-help posture that also offends the admonition contained in *Northdown Drywall* and we decline to play a role in this "game". Thus, even if we were satisfied that the employers' actions constituted an unlawful lock-out, we would have refused the relief requested. However, we are of the opinion that the application fails on the statutory definition of a lock-out in that the employer has continued to offer employment to the employees affected - albeit on its terms.

18. For all of these reasons the matters are dismissed.

16. In *Canadian Elevator Manufacturers*, the Board concurred in the sentiments expressed in *Northdown Drywall & Construction Limited, supra*. The "plague on both of your houses" approach in both of these cases is based upon a finding by the Board that the party which sought the discretionary relief provided in a cease and desist direction ought to have behaved reasonably in entering into the contractual obligations and ought to have made an attempt to resolve the basis of the dispute by resorting to the grievance arbitration over the language of the collective agreement. In *Canadian Elevator Manufacturers*, the employer and the trade union had been guilty of brinkmanship in adopting positions and filing for relief in order to reinforce self-help postures. The root cause of the work stoppages lay within the binding interpretation of the provisions of the collective agreement and neither party to that collective agreement had taken any steps to resolve the meaning of the provisions which were in dispute. Where no attempt had been made to avoid or address the root cause of the work stoppage, the Board was not prepared to issue a cease and desist determination which would address only the symptoms and not the causes of the breakdown in their industrial relations where the parties had themselves taken no steps to solve the cause of the breakdown.

17. In the view of the Board, the approach adopted in *Canadian Elevator Manufacturers* and *Northdown Drywall & Construction Limited* rests upon the particular facts in each of those cases. In each of those cases the breakdown in the industrial relations which led to work stoppages had resulted from the acts of one or both parties in either recklessly entering into inconsistent contractual obligations, or in avoiding any attempt and failing to submit their differing interpretations of a new collective agreement to binding arbitration. In the instant case, neither of those situations are present. The collective agreement between the applicant and the union and Local 1967 was not filed before the Board. Therefore, the Board is not in a position as was done in *Canadian Elevator Manufacturers* to consider the provisions of the relevant collective agreement. Moreover, the parties in this case have taken two steps under the collective agreement, the appeal provisions and the expedited arbitration in order to try and resolve their differences. In addition, some of the respondents have filed a complaint under section 89 which alleges violations of the *Labour Relations Act*. All of these avenues have been pursued by the parties in order to find a solution to the present confrontation which arises over the interpretation of the collective agreement. The well-known arbitral principle of work now and grieve later is aptly applied in the circumstances of this application.

18. The *Labour Relations Act* provides an orderly process for obtaining and terminating bargaining rights. The Act places limitations on the conduct of employers, trade unions and employees and provides for relief where such conduct contravenes the provisions of the Act. The Act further provides for the resolution of differences in the interpretation of collective agreements by means of arbitration without stoppage of work. The Act also provides for the negotiation of collective agreements and for the commencement of lawful strikes and lawful lockouts once the employer and the trade union have fulfilled the requirements of the Act. Strikes and lockouts which occur during the term of a collective agreement are unlawful. See section 72. Sections 92, 93 and 135 provide for relief where it is alleged that an unlawful strike or an unlawful lockout is occurring. The Board has the authority to expedite the hearing of such complaints. See section 82 of the Board's Rules of Procedure. This was done in the instant application. The purpose of sections 92, 93 and 135 is to prevent resort to unlawful strikes and unlawful lockouts and to require the parties to resolve their differences within the framework of the Act.

19. In the case of an unlawful strike, the purpose of section 92 is to provide an employer with an avenue of redress and obviate the option of the employer of resorting to sanctions such as suspension or termination of employment or seeking damages against employees or trade unions by way of arbitration or in a proceeding before the Board. While an employer may be entitled to apply such sanctions, the application of such sanctions would exacerbate an already bad situation. Neither the commencement of an unlawful strike nor the reaction of sanctions by an employer preserve the *status quo* until the real problem can be dealt with. Indeed, unlawful strikes and the use of sanctions create new problems between the parties. The expedited procedure adopted by the Board is an attempt to preserve the *status quo* so that the parties may avail themselves of lawful procedures and deal with the real problem rather than be faced with symptoms of their problem.

20. The parties agreed that any anticipated job loss was several months or quarters away rather than days or weeks. Moreover, they also agreed that the *status quo*, that is to say, the position that existed before the creation of the super classification, could be restored in the event that the respondents' views prevailed at either the appeal or the arbitration or appropriate relief was awarded under section 89. There was no dispute that there had not been any changes in wage rates and that only eight employees had been affected. Clearly the present situation is not irreversible.

21. The conduct of Mr. Patrick and Mr. Khalid, counsel conceded, had persuaded the employees to stop work for five minutes every Monday rather than engage in a complete work stoppage and a walkout. However, the conduct of Mr. Patrick and Mr. Khalid must also be examined prior to the work stoppage. The leaflets bear the names, among others, of both men. The leaflets are in a form which indicates endorsement, if not the authorship of both men. The pamphlets created an atmosphere of crisis and an untrue indication of an immediacy of the loss of jobs, were couched in emotive terms and prepared the way for the work stoppages which were complained of by promoting demonstrations during the lunch period. There is no doubt that as officers, officials or agents of Local 1967, the conduct of Mr. Patrick and Mr. Khalid was clearly within the scope of their authority to act on behalf of Local 1967. By virtue of section 99(2) the conduct of Mr. Patrick and Mr. Khalid is deemed to be an act or thing done or omitted by Local 1967.

22. The respondents maintained that the applicant had not suffered any loss of production



due to the work stoppage. For this proposition to be true, it would mean that the employees who engaged in the work stoppage do not normally produce goods and services for the applicant. The Board rejects this proposition and finds that the applicant did sustain a limitation on its output. Section 1(1)(o) of the Act states:

“strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

The facts before the Board establish that the employees of the applicant ceased working on November 18, 1985, in combination or in concert or in accordance with a common understanding within the meaning of section 1(1)(o) and that similar stoppages were planned for successive Mondays. The Board is satisfied on the facts before it that Local 1967 called an authorized or threatened to call or authorize an unlawful strike of the employees of the applicant. The Board is further satisfied that Mr. Patrick and Mr. Khalid as officers, officials or agents of Local 1967 counselled or procured or supported or encouraged an unlawful strike of the employees of the applicant.

23. The Board appreciates the concern of employees over the perception that certain conduct by the applicant/employer will cause a decrease in the number of employment opportunities and decrease job security. However, there is a dispute over whether this will, in fact, be the case and, as stated earlier, the *status quo* can be revived and maintained in the event that the position of the applicant is not sustained. It is for these reasons that the Board issued the cease and desist direction in this matter on November 22, 1985.

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**1514-85-R** United Electrical, Radio and Machine Workers of Canada (UE), Applicant, v. **Meco Group Inc.**, Labelmasters and Papermasters Divisions, Respondent, v. Group of Employees, Objectors

**Certification - Petition - Practice and Procedure - Revocations on its face leaving doubt whether signed subsequent to signing of petition - Board requiring viva voce evidence to determine whether petition or revocation to later in point of time - Evidence not establishing revocations to be later - Board deciding to inquire into petition**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *L. C. Collins*.

**APPEARANCES:** *Frank Piserchia* and *Wayne Gray* for the applicant; *David Elenbaas*, *Shawna Kadykalo* and *Guy Melton* for the respondent; *Patrick Mascarenhas*, *Bruce Dawe* and *Desmond Yeo* for the group of employees.

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON;** December 16, 1985

1. The parties are agreed that the correct name of the respondent is: “Meco Group

Inc., Labelmasters and Papermasters Divisions'' and the style of cause of the application has been amended accordingly.

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties disagree whether the bargaining unit should be described to exclude part-time employees and whether Marion Ismond exercises managerial functions and should be excluded from the bargaining unit. The respondent was not employing any part-time employees at the making of the application, but the respondent and objectors claim that there is a history of the respondent employing part-time employees. The applicant contends that there is no history of the respondent employing part-time employees and, therefore, part-time employees should not be excluded from the bargaining unit. The applicant also takes the position that Ismond exercises managerial functions within the meaning of section 1(3)(b) of the Act and should be excluded. The respondent and objectors take the opposite position. The parties are otherwise in agreement respecting the description of the appropriate bargaining unit. The extent of their agreement is expressed as follows:

All employees of the respondent in the Town of Halton Hills, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.

5. The parties were advised at the hearing that the ultimate determination of the bargaining unit issues could not affect the applicant's entitlement to certification without a representation vote. Regardless of how those issues were resolved, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 30, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. Notwithstanding the fact that the applicant had as its members the requisite number of employees in the bargaining unit in order for it to be entitled to certification without a representation vote, the Board has before it a statement of opposition to the application (''petition'') containing the signatures of eight persons who had also signed applications for membership in the applicant. Furthermore, the Board received four identically worded, individual statements by persons purporting to be employees of the respondent reaffirming their support for the application. These statements say:

I hereby revoke my signature on the petition against the union and re-affirm my membership in and support for the United Electrical, Radio and Machine Workers of Canada (UE) to represent me in collective bargaining with Labelmasters Limited.

The Board will refer to these latter documents as ''revocations''. Two of these revocations were signed by employees in the bargaining unit who had also signed the petition. The petition and the revocations were filed with the Board not later than the terminal date of the application and are timely. While these documents do not alter the fact that on the terminal date of this application more than fifty-five per cent of the employees in the bargaining unit at the making

of the application were members of the applicant within the meaning of section 1(1)(l) of the Act, they do raise a question of what were the wishes of the employees respecting this application as at its terminal date. If the petition expresses the voluntary wishes of the employees who signed it, but for the revocations, it would raise sufficient doubt concerning the continued support for certification of the applicant by a sufficient number of employees who also signed membership cards, that the Board would generally exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote. On the other hand, if the revocations were made after the employees had signed the petition, are found to express the voluntary wishes of those two employees and are treated by the Board as having restored to the union the support of the two employees, the result would be to put the union back in a position where it was entitled to certification without a representation vote. Thus, the two revocations are relevant to deciding the wishes of the employees and to the question of whether the applicant is entitled to certification without a representation vote.

7. The Board advised the parties that the revocations were relevant and that it has been the Board's long standing policy to rely on the most recent, voluntary expression of the wishes of the employees as being the most reliable answer to the question of what were their wishes on the terminal date. For the underlying rationale for this policy, see the Board's decisions in *Browning-Ferris Industries*, [1982] OLRB Rep. June 816 and *Baltimore Aircoil Interamerican Corp.*, [1982] OLRB Rep. Oct 1387, particularly paragraph 49. Accordingly, the Board also advised the parties that it would inquire into the circumstances under which the revocations were signed and filed with the Board in order to determine whether they expressed the most recent, voluntary wishes of the employees who signed them.

8. The onus of satisfying the Board that the revocations were signed after the petition and express the voluntary wishes of the employees rests with the applicant. The applicant put forward three witnesses for purposes of the Board's inquiry: Wayne Gray, a field organizer for the applicant, and two employees who were members of the applicant's organizing committee, Warren Cridland and Valerie Dawe. They were examined first by the Board and, in turn, by each of the parties beginning with the applicant, who also had a final opportunity in the nature of re-examination. No witnesses were called by any of the parties.

9. After the Board had completed its inquiry into the revocations, it received the submissions of the parties thereon and reserved its decision with respect to whether the revocations were voluntary and had been signed after the petition. While the documents contain the declaration "I hereby revoke my signature on the petition against the union . . . .", the Board generally does not rely on such documentary hearsay standing alone as conclusive of the validity of the revocations. Instead, by analogy to section 73(5) of the Rules of Procedure under the Act, the Board seeks *viva voce* evidence about the circumstances concerning the origin of the revocations and the manner in which each signature on them was obtained. The Board's authority to proceed by analogy to section 73(5) of the Rules comes from section 86 of the Rules. In this respect, the Board usually relies on the evidence of persons, other than the employees who signed the documents in question, who have first hand knowledge of those circumstances. This is done in order to protect the secrecy of employees' wishes regarding union representation as intended by section 111(1) of the Act.

10. This case illustrates the need for such evidence. As noted above the employees' signatures on two of the revocations do not appear on the petition, in spite of the assertion "I hereby revoke my signature on the petition..." in the revocation statement which they



signed. While the Board has expressed its understanding that employees might do that as a protective response to peer pressure (see, *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, at paragraph 49), the readiness of employees to respond that way demonstrates the risk of accepting the signed statements in the revocations as proof that they were signed after the petition. So the two identical declarations of the employees whose signatures do appear on the petition are of no probative value to the Board in deciding which document, the petition or revocation, is the more recent expression of employees' wishes. That problem could be overcome, however, by *viva voce* evidence of the circumstances surrounding the signing of the revocations such as would reveal the sequence of signing.

11. The Board finds from its review of the *viva voce* evidence that it fails to establish the revocations to have been signed after the petition. Therefore, even if the revocations are voluntary, they have not been proven to be the most recently expressed wishes of the persons who signed them. In these circumstances, it will be necessary for the Board to inquire into the petition filed in opposition to the application in order to determine whether it expresses the voluntary wishes of the persons who signed it.

12. In the result, the Registrar is directed to list this application for continuation of hearing on the earliest available date. The purpose of the hearing is to receive the evidence and representations of the parties respecting all remaining issues.

#### **DECISION OF BOARD MEMBER, L. C. COLLINS;**

1. I dissent.

2. In circumstances where, as here, the Board has before it the requisite evidence of membership in a trade union for the union to be certified, together with a petition and revocations, as long as the Board is satisfied that the revocations are voluntary, the Board should accept the evidence of membership together with the revocations as the best evidence of the employees' wishes, whether or not the revocations were signed before or after the petition.

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**1469-84-R Metropolitan Toronto Sewer and Watermain Contractors Association,** Applicant, v. International Union of Operating Engineers, Local 793, Respondent, v. The Ontario Formwork Association, Intervener #1, v. Metropolitan Toronto Road Builders' Association, Intervener #2, v. A Group of Independent Contractors, Intervener #3, Ontario Concrete and Drain Contractors Association, Intervener #4

**Accreditation - Whether Metropolitan Toronto Sewer and Watermain Contractors Association constituting employer organization - Whether properly constituted under By-Law - Whether limiting voting rights to a class of members denying association status of employer organization**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

**APPEARANCES:** *George W. Adams, Q.C., Richard J. Charney, Margaret Dancy, R.W.A. Cochrane* and *Mary-Ann Kril* for the applicant; *A. M. Minsky, Q.C., S.B.D. Wahl, E. A. Ford* and *J. Redshaw* for the respondent; *S. C. Bernardo, Jim Ross* and *Jim Ris* for intervener #2; *Bruce Binning, R. A. Werry, Daniel Fryzuk* and *W. Lippett* for intervener #3; *Hercules E. Faga* for intervener #4; *S. C. Bernardo* for Dufferin Construction Company, a Division of St. Lawrence Cement and Bot Construction (Canada) Limited, employers; *Robert D. Statton* for Dranco Group Inc., Donald Construction Limited and C.D.C. Contracting, employers; *Richard Nixon* for High Rise Crane and Rentals Limited, employer; *Frank Csaszar* for Urban Construction Equipment Ltd., employer; *Michael G. Horan* and *Tony Michael* for Fapp-Co Contractors Ltd., employer; *Michael T. Franck* for Code I Investments Inc., employer; *William S. Challis* for Lisgar Construction Company and Aztec Contracting Inc., employers; *Richard A. Monette* for Ellis Don Limited and Aztec Contracting Inc., employers; no one appearing for intervener #1.

## **DECISION OF THE BOARD; December 18, 1985**

1. The applicant, Metropolitan Toronto Sewer and Watermain Contractors Association ("the Association") has applied pursuant to section 125 of the *Labour Relations Act* to become the accredited bargaining agent of a group of employers in the sewers and watermain sector of the construction industry in the Board's geographic area #8. Section 125 provides as follows:

Where a trade union or council of trade unions has been certified or has been granted voluntary recognition under section 16 as the bargaining agent for a unit of employees of more than one employer in the construction industry or where a trade union or council of trade unions has entered into collective agreements with more than one employer covering a unit of employees in the construction industry, an employers' organization may apply to the Board to be accredited as the bargaining agent for all employers in a particular sector of the industry and in the geographic area described in the said certificates, voluntary recognition documents or collective agreements, as the case may be.

2. The Association and the respondent, International Union of Operating Engineers, Local 793 ("Local 793") are parties to a collective agreement signed July 31, 1984 to be effective from May 1, 1984 to April 30, 1986 ("the Agreement"). It is made in respect of employees of employers engaged in sewer and watermain construction in a geographic area which may generally be described as Board area #8. The Agreement applies to more than one employer. The Board finds, therefore, that it has jurisdiction under section 125 of the Act to entertain this application.

3. Local 793, several of the interveners and several employers have challenged the status of the Association to bring the application on the grounds that it is not a properly constituted employers' organization with appropriate vested authority to bargain for the employers whom it represents. This is an interim decision dealing only with that threshold issue. The sections of the Act which bear on that question are:

1.-(1) In this Act,

• • •

- (f) "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

• • •

- (j) "employers' organization" means an organization of employers formed for purposes that include the regulation of relations between employers and employees and includes an accredited employers' organization and a designated or accredited employer bargaining agency;

117. In this section and in sections 118 to 136,

• • •

- (c) "employer" means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.
- (d) "employers' organization" means an organization that is formed for the purpose of representing or represents employers as defined in clause (c).
- (e) "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

127.-(3)

Before accrediting an employers' organization under subsection (2), the Board shall satisfy itself that the employers' organization is a properly constituted organization and that each of the employers whom it represents has vested appropriate authority in the organization to enable it to discharge the responsibilities of an accredited bargaining agent.

4. The Association is a corporation under the *Corporations Act*, R.S.O. 1980, c. 95. It was incorporated by Letters Patent dated October 16, 1957, issued under the predecessor statute, the *Corporations Act*, 1953. Supplementary Letters Patent were issued by the Minister of Consumer and Commercial Relations on May 16, 1972. A certified true copy of the latter document filed by the Association shows the objects of the Association to include, amongst other things, the following:

- (1) to represent its members, or any other persons whom the Association may be entitled to represent in matters pertaining to the construction industry in Ontario or any geographic area of Ontario and negotiate on their behalf;



- (2) to enter into trade and other agreements respecting wages and all other matters on behalf of members or the other persons;
- (3) to act on their behalf in the administration and interpretation of such trade or other agreements and in the arbitration of disputes under those agreements;
- (4) to authorize other associations or organizations to do all of the foregoing;
- (5) to become an accredited employers' bargaining agent, alone or jointly with other organizations;
- (6) to regulate relations between employers and employees in the construction industry; and
- (7) to represent employers in the construction industry in collective bargaining in any sector of the construction industry in any geographic area defined under the *Labour Relations Act*.

5. The Association filed as Schedule "B" of its application a document titled By-Law No. 9 "A by-law relating generally to the transaction of business and conduct of affairs of Metropolitan Toronto Sewer and Watermain Contractors Association". Page 16 of the document bears the following statement:

I Remo Bandiera, Secretary Treasurer of the Metropolitan Toronto Sewer and Watermain Contractors Association do hereby certify that this is a true copy of the By-Laws of the aforesaid Association.

The statement is signed and dated August 28, 1984. The document does not bear the corporate seal of the Association. Absent consent of the parties to accept the document as the by-laws of the Association, Association counsel elected to call *viva voce* evidence to prove the document. As a result, the Board heard the testimony of Tony Cosentino and Michael Poce.

6. Cosentino testified first. He is one of seven directors of the Association and was last elected in 1984 for a two-year term. He has been a director since 1981 when he was elected at the annual meeting of the Association. He recalled By-Law No. 9 being discussed at the meeting. While he believed By-Law No. 9 to be the Association's only by-law, he was unaware whether specific action had been taken to repeal any by-laws. Cosentino testified in cross-examination that he had seen the original copy of By-Law No. 9 which is kept in the minute book of the Association. He was unaware of any difference between the original and the photocopy which had been filed with the Board, except for the certification of the photocopy. Cosentino was uncertain whether the original copy bore the corporate seal of the Association.

7. It was necessary to adjourn the proceedings after Cosentino's examination was completed without receiving any other evidence or submissions. As a result, Association counsel reserved his decision whether to close his case in-chief with Cosentino's evidence. Counsel complied with the Board's direction and advised the Board and other parties prior to the continuation of the hearing that the Association would be calling further evidence to prove By-Law No. 9.

8. When the hearing continued, Michael Poce, President of the Association, was called

to testify for the Association. He was a director of the Association at the time of its annual meeting, April 9, 1981 and had served on a committee of directors which studied revisions of the Association's by-laws prior to that meeting. He testified that a motion at the annual meeting to adopt By-Law No. 9 was accepted unanimously. The minutes of the annual meeting and the original copy of By-Law No. 9 were introduced into evidence through Poce. The By-Law is signed by the president and the secretary-treasurer of the Association. In cross-examination Poce could not recall whether the notice of the annual meeting made reference to the repeal of By-Laws No. 1 through No. 8 and he was unaware of any by-laws being repealed at the annual meeting. Nor could he recall whether there had been a directors' meeting prior to the annual meeting on April 9th, although he acknowledged that By-Law No. 9 purports to have been enacted on April 9, 1981. The minutes of the annual meeting record that a quorum of voting members was present and that "A lengthy discussion was held on [revisions to the Association By-Laws] after which the new By-Laws were unanimously accepted."

9. Minutes of a Board of Directors meeting held April 7, 1981 were admitted in evidence by agreement of the parties. They are signed by the president and the secretary treasurer of the Association. Minute No. 454 records that a motion was passed "... for adoption of the By-Laws and for presentation of same at the annual meeting."

10. Cosentino testified that the Association has conducted elections of directors, held regular meetings of the Board of Directors and annual meetings pursuant to By-Law No. 9. Poce testified in cross-examination that the 1982-84 collective agreement was negotiated after the April 9, 1981 enactment date of By-Law No. 9.

11. By-Law No. 9 is titled as follows:

#### BY-LAW NO. 9

A by-law relating generally to the transaction of business and conduct of affairs of METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION BE IT ENACTED AND IT IS HEREBY ENACTED as a by-law of METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION (hereinafter called the "Corporation"), as follows:

Its various sections, amongst other things, provide that:

- (1) the Board of Directors shall be composed of seven elected directors (clause 3.01);
- (2) the affairs of the Association shall be managed by the Board plus the immediate past president of the Association unless he is a director (clause 3.02);
- (3) the board "... shall manage or supervise the management of the affairs and business of the [Association]" (clause 3.08);
- (4) the directors of the Association may administer its affairs and generally exercise the powers and do the things which the Association is authorized by its charter to do (clause 3.15);
- (5) the powers of the board to manage the Association can be delegated to agents or attorneys for the corporation, including the power to sub-delegate, as the Board may think fit (clause 5.08);

(6) membership of the Association shall consist of such individuals, corporations, partnerships and legal entities as are admitted as members by the Board of Directors (clause 9.01);

(7) there shall be two classes of membership, corporate and associate (clause 9.02);

(8) corporate members are persons, firms, incorporations and their authorized representatives, actively engaged in a sewer and watermain contracting business, who have been admitted to membership (clause 9.03), and they are entitled to vote at all meetings of members of the Association (clause 9.04);

(9) associate members, in general terms, are businesses actively engaged as suppliers to the sewer and watermain industry who have been admitted to membership; they are not entitled to vote at meetings of the Association (clause 9.06);

(10) a qualified applicant for membership shall not be prevented from becoming a member of the Association except for fair and reasonable cause (clause 9.09);

(11) the Association shall not act in a manner that is arbitrary, discriminatory or in bad faith in its representation of any employer in connection with labour negotiations, whether the employer is a member of the Association or not (clause 9.09);

(12) the Association shall not discriminate against any employer or other organization with respect to fees, dues or levies whether or not the employer or organization is a member of the Association (clause 9.09);

(13) membership shall not be suspended or terminated except for fair and reasonable cause (clause 9.09); and

(14) with the coming in force of By-Law No. 9, By-Laws 1 through 8 inclusive are repealed (Clause 15.02).

12. Section 13 of By-Law No. 9 deals specifically with labour relations and defines "labour matters" to include such things as the representation by the Association of employers as an employers' organization under the *Labour Relations Act*, labour negotiations, administration and interpretation of collective agreements, arbitration of disputes under collective agreements and all matters relating to an application for accreditation under the *Labour Relations Act* and matters necessarily incidental to the carrying out of responsibilities of an accredited employers' organization as defined by the *Labour Relations Act* (clause 13.01). When votes are taken on labour matters as defined in By-Law No. 9 only corporate members who have delivered to the Association written authorizations to bargain on their behalf with respect to labour matters are entitled to vote (clause 13.02). All questions dealing with labour matters are to be decided by a majority of the votes cast on the question.

13. Other documents which are relevant to the Association's status to bring this application are the collective agreements between it and Local 793 for the periods 1982-84 and 1984-86 and the form of authorization for the Association to act for its members.

14. The 1982-84 collective agreement, which was signed to be in effect until April 30, 1984, displays the following style and preamble:

Between:

THE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS



ASSOCIATION, by and on behalf of *its member Companies whose signatures are individually affixed hereto* hereinafter called the "Employers"

OF THE FIRST PART

- and -

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

hereinafter called the "Union"

OF THE SECOND PART

WHEREAS the Association, acting on behalf of those of its members who are signatory to this Agreement, and the Union wish to make a common Collective Agreement with respect to certain employees of the Employers engaged in sewer and watermain construction, and to provide for and ensure uniform interpretation and application in the administration of the collective bargaining agreement;

AND WHEREAS, in order to ensure uniform interpretation and application of the Collective Agreement, the said Union recognizes the formation by the Employers of the Association and agrees to deal with the said Association as the agent of the Employers who are members thereof in negotiating and administering a common Collective Agreement and agrees not to negotiate with any of the said Employers on an individual basis;

• • •

(emphasis added)

The agreement is signed, as the style and the preamble suggest, by employers individually and not by the Association. For example, Cosentino signed it for the company which he represents in the Association, Warden Construction Company Ltd., as did Poce for Poce Construction Limited.

15. The 1984-86 collective agreement was signed July 31, 1984 to be effective from May 1, 1984 to April 30, 1986. It bears the following style and preamble:

Between:

THE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION on behalf of its Contractor Member Companies listed in Appendix "A" hereto.

(The Contractor Member Companies listed in Appendix "A" are hereinafter called the Employer or Employers)

## OF THE FIRST PART,

- and -

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

(hereinafter called the "Union")

## OF THE SECOND PART.

WHEREAS the Association acting as an employers' organization on behalf of its contractor members listed in Appendix "A" hereto, but without personal liability for any violations by the Employers of this Collective Agreement and the Union wish to make a common Collective Agreement with respect to certain employees of the Employers engaged in Sewer and Watermain Construction listed in Appendix "A" and to provide for and insure uniform interpretation and application to the Administration of the collective bargaining agreement.

AND WHEREAS in order to insure uniform interpretation and application of the Collective Agreement the said Union recognizes the formation by the Employers of the Association as the agent of the Employers who are members in good standing and who have given the Association written bargaining authority in negotiating and administering a common Collective Agreement and agrees not to negotiate with any of the said Employers on an individual basis.

• • •

It is signed for the Association by Poce as president, and by the secretary treasurer. There are no signatures of individual employers.

16. The form of employer authorizations filed by the Association in support of this application purports to authorize and appoint the Association as the employer's agent to apply for accreditation under the Act and thereafter act as the employer's accredited bargaining agent with respect to the sewers and watermains sector of the construction industry in Board Area No. 8, or such modified description of Board Area No. 8, as the Board may deem appropriate.

17. The respondent, interveners #2, #3 and #4 and various employers contend that the Association is not an employers' organization within the meaning of section 1(1)(j) of the Act and is not a properly constituted organization and lacks the vested authority to discharge the responsibilities of an accredited bargaining agent pursuant to section 127(3). Their arguments were explicit and forceful and, while the Board has considered and weighed them carefully, including the submissions on the weight to be given to the evidence, it does not intend to set them out in detail here. Instead, it will group and summarize them, with the caveat that not all arguments were made or adopted by each party or employer.

18. With respect to the contention that the Association is not an employer's organization within the meaning of section 1(1)(j) of the Act, it is argued that its by-laws do not explicitly exclude employees from membership and are broad enough to be construed to permit employees to become members. Thus, the Board cannot be satisfied that it is and will remain an organization solely of employers.

19. The arguments in support of the contention that the Association is not a properly

constituted organization and lacks the vested authority to discharge the responsibilities of an accredited bargaining agent are more varied. These arguments all relate to the form and substance of By-Law No. 9.

20. It is argued that By-Law No. 9 was not properly enacted pursuant to the requirements of the *Corporations Act*, in that, on the evidence, the Association failed either to give proper notice of the relevant directors' meeting and annual meeting or to place properly before those meetings the By-Law for enactment and ratification. Further, the Association has failed to establish that By-Law No. 9 is its only by-law because there is no evidence that By-Laws No. 1 through No. 8 were revealed or do not exist. The Association's failure to comply with the *Corporations Act*, it is argued, makes By-Law No. 9 a nullity and precludes the Association from relying on its status as a corporation to satisfy the Board that it is a properly constituted organization.

21. In the alternative, if the Board finds that By-Law No. 9 was properly enacted, its contents are objectionable on a number of grounds that should cause the Board *not* to be satisfied that it is a properly constituted organization. First it was argued, even though By-Law No. 9 purports to give the Association the authority to bind its members in collective bargaining, the Association and its members clearly do not recognize that authority. That is evident, the argument claims, from the fact that the 1982-84 collective agreement was signed individually by the member employers, rather than by the Association's officers in their capacities as officers. An organization which holds itself out as an employers' organization with the authority to act for and bind its members in collective bargaining matters and fails to demonstrate the authority which it claims to have, it is submitted, cannot satisfy the Board that it is either properly constituted pursuant to section 127(3) of the Act, or, as the Board understands the argument, an employers' organization within the meaning of section 1(1)(j).

22. Second, it is contended that By-Law No. 9 fails to provide specific conditions of membership so that a candidate for membership can know precisely the conditions for admission to membership. At the same time, the directors of the Association are given the authority to exclude persons from membership, with the result that the directors can decide the grounds for admission to or exclusion from membership.

23. A third ground is that By-Law No. 9 gives the directors such wide discretion to delegate the management of the Association to other parties, that the Board cannot be sure who would be the actual employers' organization and who would administer it. It is argued that the directors' discretion would permit them to "give away" the power to manage the Association, or even to incorporate another organization and delegate to it all the responsibilities of the employers' organization. These conditions prevent the Board from knowing with certainty who would be discharging the responsibilities for the accredited bargaining agent should the Association be accredited.

24. The final ground argued is that clause 13.02 of By-Law No. 9 is discriminatory with respect to voting on labour matters. First of all it has the effect of creating two classes of membership, voting and non-voting, because only members who have given the Association their written authorization to bargain on their behalf are entitled to vote on labour matters. It is argued that members of non-share capital corporations are either members or not and it is contrary to the *Corporations Act* to curtail voting rights of members. Second, clause 13.02 is discriminatory on its face because the Association, if accredited, must represent all



employers in its bargaining unit whether or not they are members of the Association. Since clause 13.02 limits the power to vote to members who have assigned their bargaining rights to the Association, clearly, members who fail to do so and non-members are prohibited from voting on labour matters. Thus, by excluding from voting on labour matters, employers for whom the Association would have a statutory duty to bargain, clause 13.02 is discriminatory.

25. The Association must satisfy two criteria in order to be an employers' organization within the meaning of section 1(1)(j) of the Act. It must be an organization of employers and the purposes for which it was formed must include the regulation of relations between employers and employees. The objects of the Association as set out in items 5, 6 and 7 of paragraph 4 above clearly include the regulation of relations between employers and employees; that much the parties do not contest and the Board so finds. The Board finds as well that the Association is an employers' organization, notwithstanding the contentions that it is not. The Association is not a new organization, it has existed as a corporate entity since 1957. More recently it has acted on behalf of its members by executing on their behalf the 1984-86 collective agreement. There is no evidence before the Board that at any time in its existence it has accepted employees into membership, particularly at the time of and subsequent to its execution of the 1984-86 collective agreement. In the absence of such evidence, there is no reason for the Board not to accept the definition of Corporate Membership in clause 9.03 of By-Law No. 9 (see item 8 of paragraph 11 above) as implicitly excluding employees by its reference to persons, etc. " ... actively engaged in the Sewer and Watermain Contracting Business."

26. If there is any merit at all to the argument that the signing of the 1982-84 collective agreement by the individual members of the Association, and not the Association, demonstrates that it does not have the authority to represent its members as an employers' organization, the Association's act of signing the 1984-86 collective agreement on behalf of its members would have corrected any flaw which might have been created by the way the prior agreement was signed.

27. Therefore, the Board finds that the Metropolitan Toronto Sewer and Watermain Contractors Association is an employers' organization within the meaning of section 1(1)(j) of the *Labour Relations Act*.

28. The Board turns next to the question of whether the Association is a properly constituted organization.

29. With respect to the argument that By-Law No. 9 has not been properly enacted pursuant to the *Corporations Act*, the Board has documentary evidence before it in the form of minutes of the Association's annual meeting held April 9th, 1981 and a directors' meeting held April 7th, 1981. Neither the excerpt from the minutes of the annual meeting quoted at paragraph 8 nor the excerpt from the directors' meeting quoted at paragraph 9 refer to By-Law No. 9 by that title. Cosentino and Poce both testified that By-Law No. 9 was discussed and adopted at the annual meeting. Cosentino testified also that the Association has conducted its regular business pursuant to that by-law. Having regard to their evidence, the Board is satisfied that the minutes of the annual meeting are referring to By-Law No. 9 when they say "... the new By-laws were unanimously accepted." It is reasonable to infer from the same evidence that the minutes of the Board of Directors' meeting are also referring to By-Law No. 9 when they say that a motion was passed "... for the adoption of the By-Laws and for

presentation of same at the annual meeting.''. The minutes of both meetings are signed by the president and the secretary-treasurer. Pursuant to section 299(2) of the *Corporations Act* they are admissible in evidence as *prima facie* proof of those proceedings and pursuant to section 299(3) those meetings are deemed to have been duly called, constituted and held and all proceedings to have been duly had. Section 301 of the *Corporations Act* makes the Association by-laws admissible in evidence as *prima facie* proof of all facts stated therein. Having regard to all of the foregoing, the Board finds that By-Law No. 9 has been properly enacted by the Association and, pursuant to clause 15.02 thereof, By-Laws 1 through 8 have been repealed. Therefore, the Board finds that By-Law No. 9 is the by-law of the Association.

30. Turning to the arguments with respect to the substance of By-Law No. 9, the Board finds the argument without merit that the members of the Association, by virtue of having signed the 1982-84 collective agreement, were demonstrating that they do not recognize the Association's authority to bind them in collective bargaining. Nor does the Board agree with the argument that By-Law No. 9 is deficient in its conditions for membership. To become a corporate member, the candidate has to be actively engaged in a sewer and watermain contracting business and be admitted by the Board of Directors. Clause 9.09 requires that there be fair and reasonable cause for preventing a qualified applicant from becoming a member. More importantly, a similar safeguard exists in section 133 of the Act.

31. The third ground on which it is argued that By-Law No. 9 is objectionable is the discretion given to the Board of Directors of the Association to delegate its management to others. The argument focuses primarily on the possibility that this discretion might be exercised in a manner which would prevent the Board from knowing with certainty who would be discharging the responsibilities of the accredited bargaining agent as a result of the Board of Directors "giving away" the power to manage the Association, perhaps to the extent of incorporating another organization and delegating to it the responsibilities of the employers' organization. The basis of the argument is entirely hypothetical. As the Board has already noted, the Association has been in business for a considerable time. There is no evidence that its directors have abused their powers to delegate management of the Association. In any event, By-Law No. 9 leaves no doubt that actions taken by anyone to whom the Board of Directors, pursuant to the By-Law, has delegated authority to manage the Association, are actions for which the Association is ultimately responsible. To delegate power is not to abandon responsibility as this argument suggests. Thus, the Board finds no grounds for finding the delegatory powers of the Board of Directors to be an impediment to the Board being satisfied that the Association is a properly constituted organization.

32. The Board turns now to the final ground that clause 13.02 establishes voting conditions on labour matters which are discriminatory. The argument is made in two parts, the first of which is that clause 13.02, by creating two classes of membership, voting and non-voting, violates the *Corporations Act*. The Board disagrees. Section 125 of the *Corporations Act* contemplates that the by-laws of a corporation may provide that a member has no vote. The second part of the argument is that, by limiting voting privileges on labour matters to members who have assigned their bargaining rights to the Association, clause 13.02 discriminates against members who have not made that assignment and non-members for whom the Association would be the accredited bargaining agent pursuant to section 128(1) of the Act.

33. There is nothing inherently wrong or discriminatory in a condition that only

members of an organization have a voice in the organization's policy matters. Nor is it inherently wrong or discriminatory for an organization to limit the right to vote on policy matters to a prescribed class of member. Clearly, the Legislature has not considered it to be inherently wrong to limit the right to vote in that way. With the exception of what is now section 39 of the Act, which gives the Minister discretion to direct a last-offer type of vote after a strike or lock-out, the Act was silent until the 1980 amendments respecting who was eligible to vote in strike, lock-out or ratification votes. When those amendments were made, they introduced what is now section 40 and amended what is now section 72(5). Section 40 is a last-offer type vote that may be requested by an employer. The eligibility to vote is the same as in section 39, that is, all employees in the bargaining unit. Section 72 deals with strike and ratification votes. Its predecessor set no eligibility standards. The predecessor to section 72(5) required only that employees entitled to vote have ample opportunity to do so. Section 72(5) defines eligible voters as all employees in a bargaining unit "... whether or not [they] are members of the trade union ...". Prior to those amendments, with the exception of section 39, the Act left it up to the trade union bargaining agency to decide who was eligible to vote, subject to whatever limitations might be imposed by its duty of fair representation under section 68 of the Act.

34. It is significant that the 1980 amendments did not deal with the eligibility of employers to vote respecting lock-outs or ratifications where they are represented in collective bargaining by an employers' organization, including an accredited one or a designated employer bargaining agency under the province-wide bargaining scheme. The Act remained silent on this matter until 1984 when section 149a was introduced (R.S.O. 1984, c. 34 s. 5). Section 149a(2) deals with lock-out and ratification votes conducted by a designated employer bargaining agency. In general terms, it makes all employers represented by the agency eligible to vote. The Legislature did not see fit to introduce a similar provision for accredited employer bargaining agents. It is reasonable to conclude that the Legislature had not perceived any need for a similar provision. In the result, accredited employers' organizations are free to set their own conditions for voter eligibility on lock-out and ratifications subject to any limitations which might be imposed by their duty of fair representation under section 132 of the Act.

35. Therefore, the provisions of clause 13.02 of By-Law No. 9 do not provide cause for the Board not to be satisfied that the Association is a properly constituted organization. That is not to say the Board is without concern at all about clause 13.02. While the clause may be a permissible voting restriction for an unaccredited employers' organization, if the Association becomes accredited, section 128 of the Act makes the need for an assignment redundant. It gives the Association the authority to bargain for all members captured by the accreditation order which it previously had required from its members. Therefore, should the Association be accredited and then deny a member the right to vote on labour matters solely because the member had not given the Association a written assignment of bargaining rights, it would be at risk of being found to have acted arbitrarily and in violation of section 132 of the Act. That does not give the Board licence, in exercising its discretion under section 127(3), to adopt as a criterion a standard of conduct contemplated by section 132 of the Act. Section 132 by its wording only applies to an accredited employers' organization, it is not a standard for determining whether an organization is an employers' organization within the meaning of section 1(1)(j) of the Act or whether it is a properly constituted organization, as inferred by the argument that clause 13.02 is objectionable.

36. Having regard to all of the foregoing, there is nothing in By-law No. 9 that would cause the Board not to be satisfied that the Association is a properly constituted organization.



37. While the Board has chosen to deal with and dismiss each of the grounds on which the respondent, three interveners and some employers have contended that the Association is not properly constituted, even if the Board had found the content of By-Law No. 9 objectionable as contended, it has serious concern that it might be acting in excess of its jurisdiction within the principles of *CSAO National (Inc.) re Oakville Trafalgar Memorial Hospital Association and Ontario Labour Relations Board* (1972), 26 D.L.R. (3d) 63, to rely on those grounds as the basis for being satisfied, pursuant to section 127(3) of the Act, that the Association is not a properly constituted organization. *CSAO National (Inc.)* had applied for certification but had not previously established that it was a trade union within the meaning of what is now section 1(1)(p) of the Act. It was, to quote the court, "... a company organized under the *Canada Corporations Act*, R.S.C. 1970, c. 32, having amongst its objects the representation of its members in matters governing their relationship with their employers.". Nonetheless the Board found that the by-laws of *CSAO National (Inc.)* discriminated against a certain group of members with respect to the rights and privileges which they could exercise within the union and, to quote the Court at page 66, "... the Board held that the union is not a trade union within the meaning of the *Labour Relations Act* and it accordingly dismissed the application for certification.". The Court found that to be an assumption by the Board of a jurisdiction it did not have. Jessup, J.A., writing for the Court at page 68 put it this way:

In my opinion, through error of law in the interpretation of section 1(1)(n) [now section 1(1)(p)] apparent on the face of the record, the Board assumed a jurisdiction it did not have to create an unjustified impediment to the right of the union to certification subject to satisfying the express conditions to certification provided by the statute.

38. Were the Board in the instant case to find the Association to be an organization of employers, with objects as are in evidence here, and then find that it was not an employers' organization within the meaning of section 1(1)(j) of the Act because, for example, its by-laws establish two classes of membership, voting and non-voting, with respect to labour matters, its conduct would be on all fours with the conduct which, in *CSAO National, supra*, the courts found to be an assumption by the Board of a jurisdiction it did not have. While a determination under section 127(3) as to whether the Board can be satisfied that the Association is a properly constituted organization is not wholly analogous to a determination under section 1(1)(j) or 1(1)(p), it is sufficiently analogous that the Board might be courting a similar result to that in *CSAO National, supra*, if it found the Association not to be a properly constituted organization solely because the contents of By-Law No. 9 were objectionable, when it is a corporation under the *Corporations Act*, has enacted by-laws and is carrying on its business pursuant to those by-laws.

39. Moreover, for employers represented by an accredited employers' organization, sections 132, 133 and 134 of the Act set out hereunder, contain safeguards against the kinds of potential misconduct raised herein by the interveners and employers:

132. An accredited employers' organization, so long as it continues to be entitled to represent employers in a unit of employers, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the unit, whether members of the accredited employers' organization or not.

133. Membership in an accredited employers' organization shall not be denied or terminated except for cause which, in the opinion of the Board, is fair and reasonable.

134. An accredited employers' organization shall not charge, levy or prescribe initiation fees, dues or assessments that, in the opinion of the Board, are unreasonable or discriminatory.

These sections set standards of conduct which an employers' organization must satisfy *after* accreditation. They are not pre-conditions to accreditation, to being found an employers' organization within the meaning of section 1(1)(j) of the Act, or to satisfying the Board pursuant to section 127(3) that an employers' organization is properly constituted. The grounds on which the parties herein based their objections are in the nature of extra pre-conditions to be satisfied before accreditation, particularly the grounds with respect to the sufficiency of membership conditions, the discretion of the Board of Directors respecting admission to membership, the power to delegate the management of the Association, and the voting requirements of clause 13.02 of By-Law No. 9. In the Board's view, if, because of By-Law No. 9, the Board was to anticipate that the Association might violate one of sections 132, 133 or 134, conclude therefore that it was not properly constituted and deny it accreditation, the Board could be found to be assuming a jurisdiction it does not have.

40. For all of the foregoing reasons, the Board confirms its earlier finding above that the Metropolitan Toronto Sewer and Watermain Contractors Association is an employers' organization within the meaning of section 1(1)(j) of the *Labour Relations Act*, and further, pursuant to section 127(3), the Board is satisfied that the Association is a properly constituted organization and that there is nothing in the Association's By-Law No. 9 which prevents the Board from being satisfied that the employers whom it represents have vested appropriate authority in it to enable it to discharge the responsibilities of an accredited bargaining agent. It remains to be determined, however, whether the documentary evidence of representation filed with the application establishes that every employer whom the Association represents has vested the Association with the aforesaid appropriate authority.

41. The Board directs that hearings into all remaining matters arising out of and incidental to this application continue as scheduled.

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**1962-85-M Local 50 International Union of Elevator Constructors, Applicant, v. Montgomery Elevator Co. Limited, Respondent**

**Construction Industry Grievance - Practice and Procedure - Two prior decisions having interpreted clause in dispute - Whether res judicata - Whether International and Local unions same parties for application of res judicata - Whether union entitled to seek relief under clause not referred to in grievance**

**BEFORE:** *Robert J. Herman*, Vice-Chairman, and Board Members *J. W. Murray* and *T. H. Meagher*.

**APPEARANCES:** *Ernest Shaw, Reginald V. Spires* for the applicant; *C. C. White, R. Stinson, J. Aird* and *B. Taylor* for the respondent.

**DECISION OF THE BOARD;** December 18, 1985

1. This is the referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.

2. For reasons given below, this grievance is hereby dismissed.

3. The grievance in question reads:

“It has come to the attention of Local 50 that one of your employees Mr. R. Spires has been assigned to the 80% wage classification, [sic] Local 50 contends that this action is contrary to and in violation of Article 10.15 of the Ontario Provincial Agreement and advised you that if Mr. Spires is not reinstated to the 100% wage classification and reimbursed for all wages and benefits lost due to this action, then this letter to you becomes a formal grievance.”

4. The parties provided the Board with a copy of the collective agreement effective from June 9, 1982 to April 30, 1984. The parties further agreed that the wording of Article 10.15 contained therein was identical in all respects to the wording of Article 10.15 in the current collective agreement. That article reads as follows:

In the event that lack of work requires a reduction in the number of employees in the employ of an employer, employees shall be laid-off in the following order:

- (a) Probationary Helpers I, without regard to seniority. (First block to be laid off.)
- (b) Probationary Helpers II, without regard to seniority. (Second block to be laid off.)
- (c) Helper I, without regard to seniority. (Third block to be laid off.)
- (d) Helper II, without regard to seniority. (Fourth block to be laid off.)
- (e) Improver Helpers without regard to seniority. (Fifth block to be laid off.)
- (f) Mechanics in seniority, provided the Employers remaining Mechanics have the necessary skill and ability to do the work that remains.

Any Mechanic in the Employer's workforce, affected by a lack of work, may accept assignment to Improver Helper, or take a lay-off.



Assignments of this nature shall not be used as a disciplinary measure and will only be made as a result of a reduction in the Employer's workforce.

Such assignments shall not be prejudicial to the Mechanic and will not affect his classification of Mechanic for lay-off purposes.

There shall be no industry-wide bumping except that Mechanics may bump Temporary Mechanics and Probationary Helpers on an industry-wide basis. Helpers may bump Probationary Helpers on an industry-wide basis.

Notwithstanding the foregoing provisions of 10.15, an employee has no seniority rights with an Employer for a period of six (6) months after commencing work with that Employer. After the six (6) month period, full seniority rights will be credited with the new Employer. In the event of a reduction in the workforce with that Employer during the six (6) month period this employee will be the first to be laid-off with the exception of Probationary Helpers."

5. Before commencing a consideration of the merits of this grievance, the respondent raised a preliminary matter. Counsel for the respondent asked that the Board dismiss the grievance in that two prior decisions of the Board had dealt with precisely the same issue and the interpretation of the identical clause of the same collective agreement and had already definitively interpreted the article in question. In proceedings 0603-83-M and 0604-83-M the Board, differently constituted, had had to consider the applicability of Article 10.15 to a change in classification of an employee rather than to a lay-off situation. In both those proceedings, the Board had held that Article 10.15 was inapplicable to classification or reclassifications issues, but dealt only with situations of lay-off from employment.

6. Counsel for the respondent asked that the Board dismiss the grievance on three alternative grounds. First, the applicant was asking that the Board reconsider its prior decisions referred to above and this was not a proper matter for reconsideration. The applicant conceded that they were not seeking reconsideration of any prior decision and accordingly no further submissions on this point were necessary.

7. Second, counsel for the respondent argued that this matter was *res judicata* in that the two prior decisions had interpreted the identical Article of the collective agreement and that essentially the same parties had been involved in those prior proceedings. In 0603-83-M the applicant had been the International Union of Elevator Constructors and the respondents were the National Elevator and Escalator Association and Montgomery Elevator Company Limited, the respondent before the Board in this grievance. Due to the peculiar nature of the construction industry provisions dealing with province-wide bargaining and province-wide collective agreements, counsel pointed out that the collective agreement in question was the provincial collective agreement which had been applicable to all parties in the earlier proceeding. The only distinguishing feature was that the applicant was the International Union rather than a Local of that union as is the case before the Board in this grievance. In counsel's submission this was not a significant difference for purposes of *res judicata*, in that the province-wide scheme of bargaining made both the International Union and the Local parties to the very same collective agreement and there was therefore privity between those parties. Counsel did concede that the grievor in each case was different but suggested that this was not a meaningful distinction for purposes of applying the doctrine of *res judicata*. Where the same grievance between the same parties is filed with respect to the same Article of the collective agreement, the Board ought to follow those prior decisions and rule inarbitrable any

subsequent grievance unless in the Board's opinion those prior decisions are clearly wrong. Counsel referred in this regard to an excerpt from Canadian Labour Arbitration, Brown and Beatty, at page 15 and the following cases: *Re United Steelworkers, Local 1005 and Steel Co. of Canada Ltd.*, (1963) 4 L.A.C. 74; *James Stewart Mfg. Co. Ltd.* (1958) 8 L.A.C. 346; *Seneca College* (November 11, 1977, unreported) (Howard D. Brown, Chairman); and *Seneca College* (June 1980, unreported) (Howard D. Brown, Chairman).

8. In the final alternative, counsel for the respondent asked that the matter be dismissed in that a *prima facie* case had not been established and that the grievance was therefore not arbitrable. Counsel referred to *Fanshawe College* (1984) 4 D.L.R. (4th) 564. Counsel submitted that the two earlier interpretations of Article 10.15 were interpretations the Board could and ought to properly rely upon. As stated previously, those interpretations stood for the proposition that Article 10.15 could not be relied upon to deal with matters of reclassification, but was applicable only to situations of complete lay-off of an employee. Unless the applicant union could point to some aspect of this grievance that distinguished it from the grievances already decided by two prior decisions of the Board, following those interpretations would mean that no *prima facie* case had been established in this grievance.

9. In the applicant's submission this grievance did deal with different matters. The applicant conceded that the factual issue in question was the reclassification of the grievor from the 100% wage category to 80% classification. The applicant stated that the company had so reclassified the grievor for business reasons, and the grievor was being penalized through no fault of his own. When asked what distinguished the instant grievance from those before the Board in the two prior decisions, the applicant indicated that the manner in which the grievor was reclassified distinguished the instant case. The submissions of the applicant made clear that its concern was to ensure that employees were dealt with fairly by the company and that the lay-off system as implemented by the employer was unfair and ought not to be allowed.

10. In support of this view the applicant referred to Article 10.16, dealing with recall rights of employees laid off. The applicant conceded however that the grievance as filed did not refer to Article 10.16. Notwithstanding this concession, the applicant requested a ruling of the Board on the meaning and application of Article 10.16 as well as Article 10.15.

11. The two prior decisions interpreting Article 10.15 of the collective agreement hold that the Article deals with situations of lay-off from employment; that is, 10.15 is only applicable to situations where an employee has at least temporarily been removed from the workforce. Article 10.15 does not deal with reclassifications of employees from one classification (in the instant case from the 100% wage category to the 80% wage category) to another. By the admission of the applicant, the factual basis for the grievance was the reclassification of the grievor from the 100% wage category to the 80% wage category. If the Board follows the two prior decisions interpreting and applying Article 10.15 then it must dismiss this grievance as it is already been held that the Article in question does not provide a remedy to an employee in the position of the grievor. Even if the manner in which the grievor was reclassified is assumed to be unfair, as suggested by the applicant, it would not give the grievor a remedy under the Article forming the basis of this grievance, as that Article does not deal whatsoever with reclassification issues.

12. Whether or not Article 10.16 may provide such a remedy is not in the Board's view a question properly before the Board in this grievance. That Article was not referred to in the

grievance nor were any facts or submissions placed before the Board to suggest that it might be applicable. Further, there was no request to amend the grievance to now include reference to Article 10.16.

13. In our view this grievance ought to be dismissed for the reasons submitted by counsel for the respondent. While the Board is not compelled to apply the principle of *res judicata*, it appears to us to be appropriate to do so in the instant case. The interpretation and applicability of Article 10.15 of the collective agreement applicable herein has already been twice litigated before this Board. While the applicant in the two prior proceedings was the International Union of Elevator Constructors, and not Local 50 of the International Union, the provincial scheme of bargaining under the *Labour Relations Act* makes clear that the International Union of Elevator Constructors acts as agent for the individual locals which it represents in the provincial bargaining scheme. Even on a strict contract analysis, the applicant Local Union would have been privy to the provincial collective agreement and therefore to the collective agreement in question in the two prior decisions. To hold otherwise would mean that after obtaining an adjudication by the Board as to the interpretation of a particular Article, each of the union members of the provincial bargaining agency would nevertheless be able to file their own individual grievances and thereby re-litigate precisely the same issue, involving precisely the same clause or Article of the collective agreement, and in any practical sense involving precisely the same parties. The entire thrust of the province-wide bargaining scheme is to avoid such fractured bargaining and to instead have agents who can both bargain and resolve disputes on a province-wide basis.

14. Similarly, it is not a significant distinction in our view that the grievor is different in the instant case than in the two prior proceedings. We say this in part because the decisions referred to by counsel for the respondent indicate that arbitration boards have not found such a distinction persuasive, and in any event, because common sense dictates this conclusion. Again, if it were otherwise, union's could re-litigate almost endlessly issues already determined by the artifice of having different individual grievors file succeeding grievances.

15. Alternatively, it is open to the Board to rely on previous Board decisions interpreting a clause of the collective agreement, at least where the applicant or grievor cannot suggest any fact distinguishing their case from the prior decisions. Relying on those prior interpretations must mean, as counsel for the respondent suggested, that the Article relied upon by the grievor and applicant is entirely inapplicable to the fact situation before us. Even if the Board accepts as true all the allegations put forth by the applicant, it would not change the fact that the applicant is seeking relief for an improper classification pursuant to an Article of the collective agreement which deals only with lay-off from employment. There may very well be other Articles of the agreement which may be applicable to reclassification situations, but those Articles are not part of this grievance nor properly before this Board. In the absence of any factual basis upon which to find a violation of Article 10.15 the applicant has not established a *prima facie* case and accordingly the Board dismisses the grievance on this ground as well.

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**1937-85-R Ontario Public Service Employees Union, Applicant, v. Mount Sinai Hospital, Respondent**

**Certification - Practice and Procedure - Request to withdraw certification application made before vote directed - No bar imposed upon dismissal - Warning as to onus of proof for any future application as per *Mathias Ouellette* not made where no evidence union knew vote inevitable**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *F. C. Burnet* and *W. F. Rutherford*.

**DECISION OF THE BOARD;** December 19, 1985

1. This is an application for certification in which the applicant requested that the Board conduct a pre-hearing representation vote. In accordance with the Board's usual practice, it appointed a Labour Relations Officer to meet and confer with the parties concerning matters in issue between them in this application, examine the records of the applicant and the respondent to determine membership support and attempt to resolve the description of the voting constituency and list of employees in that voting constituency as of the terminal date for the purposes of any pre-hearing representation vote which might be conducted. In the course of that meeting, the applicant's representative filed with the Labour Relations Officer a written request for leave to withdraw this application. The respondent's representative advised the officer that the respondent opposed the request for leave and would be asking the Board to exercise its discretion under section 103(2)(i) of the *Labour Relations Act*, which gives the Board the power

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

2. The respondent's position is set out succinctly in its counsel's letter of November 21, 1985. The relevant portions of that letter are these:

...it is the Hospital's position that the Board ought to bar the Applicant from further applications dealing with the same or substantially the same group of employees for at least six months, pursuant to s.103(2)(i) of the *Labour Relations Act*. Alternatively, the Board ought to issue a caution to the Applicant that in the event that it brings a new application within six months, it will bear the onus of establishing that special circumstances exist to warrant the new application being heard.

It should be noted that O.P.S.E.U. has brought two applications in the past to certify this same group of employees, most recently in 1982 (O.L.R.B. File No. 1079-82-R). There can therefore be no suggestion that the Applicant in the present matter was uncertain as to the composition of the appropriate unit, or as to any related issues.

Rather, it appears that the Applicant is improperly utilizing the certification process as a form of discovery. Our position is that the Board ought to discourage such misuse by imposition of a bar.

Alternatively, the Board jurisprudence indicates that a bar may be imposed where the Union seeks to avoid an unfavourable vote by withdrawing an application after a vote has been directed. Admittedly, the [Labour Relations Officer] had not yet ordered a vote by the time that the present request to withdraw was made. Nonetheless, surely the decision as to whether or not a bar is to be imposed ought not to be predicated merely on the timing of the withdrawal. Rather, the circumstances behind the request must be examined.

In the present case, where the Applicant ought to have already been familiar with the circumstances, one can only assume that the withdrawal was precipitated by the applicant's realization that it had insufficient support for a successful application. Surely it should not be able to avoid a bar by withdrawing its application at this stage, when it would have likely faced a bar if it had merely waited until the vote was directed. We submit that the problem to be remedied is the same in each case, and thus a bar should be imposed.

3. As the Board's Practice Note No. 7 indicates, if a pre-hearing representation vote has been requested in a certification application and a labour relations officer has met with the parties, a request by the applicant for leave to withdraw the application will generally be refused, and the application will be dismissed, unless the opposing parties consent to its withdrawal. The distinction between granting leave to withdraw and simply dismissing the application without determining any of the issues raised by it is, perhaps, more symbolic than substantial. If there has been no adjudication of the merits, it cannot be said that any issue has become *res judicata* as a result of the dismissal; the question of importance is then whether and to what extent the Board will exercise its discretion under subsection 103(2)(i) as a result of the dismissal. That question was addressed in *The Bristol Place Hotel*, [1979] OLRB Rep. June 486, at paragraph 6:

... When a representation vote has been held and the applicant has failed to gain the membership support required, the Board will dismiss the application and impose a bar on future applications, generally for a duration of six months. Amongst its reasons for so doing are: to provide a cooling off period during which the employees may assess their position with respect to their desire to be represented by the applicant (see *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441); or because the Board does not consider repetitious applications where the membership evidence has been fully tested by a vote to be in the interest of sound labour relations (see *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091). Whether the Board will exercise its discretion and impose a bar in situations where it dismisses an application, following a request for leave to withdraw, depends upon the particular circumstances of that application. If, for example, while the parties to an application for a pre-hearing representation vote are meeting with a Labour Relations Officer to arrange the vote the applicant seeks to withdraw an application because it appears that the applicant has the support of less than thirty-five per cent of the members in the voting constituency, a bar will not be imposed. Similarly, if a request is made prior to the direction of the vote, the Board will not impose a bar. When a representation vote has been directed, but not held, and the applicant seeks leave to withdraw its application, the Board will dismiss the application without imposing a bar. It will, however, draw the attention of the parties to the *Mathias-Ouellette* decision. (In this respect see the Board's practice note #7 item 6 in its Rules of Procedure.) This has the effect of putting an applicant on notice that a future application made within six months could be barred if the applicant has been motivated to seek the withdrawal by fear of an election defeat. When, however, the request is made following the vote, the Board will impose a bar. In that situation, absent any special circumstances, the Board holds that a trade union should not be permitted to avoid the risk of defeat inherent in a representation vote.

The Board's approach to a "subsequent application" by a previously unsuccessful applicant was also described in *Repac Construction & Materials Limited*, [1978] OLRB Rep. Jan. 91, at paragraph 7:

7. As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: *Campbell Soup Company Ltd.*, [1976] OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See: *Mathias Ouellette* 56 CLLC 18,026). Exceptional circumstances may, however, also lead to the Board invoking the provisions of section 92(2)(i) [now 103(2)(i)] in other situations. The leading example of this is the *J. W. Crooks Company* case, [1972] OLRB Rep. Feb. 126, where “in light of the special and extreme circumstances confronting the Board”, namely four unsuccessful applications for certification made by the same applicant in a little over three months, the Board imposed a six month bar on any future applications by the same applicant. In its consideration of any request pursuant to section 92(2)(i) [now 103(2)(i)], the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in previous irregular or improper conduct. (See: *Fruehauf Trailer Company of Canada Limited* [1974] OLRB Rep. Jan. 6.).

4. It does not appear that the respondent relies on the mere existence of previous unsuccessful applications as warranting imposition of a bar upon the dismissal of this one. It is apparent from the Board’s jurisprudence that the last of a series of unsuccessful applications will be dismissed with a bar only where the applications in question have all been brought within a period of a few months: *Campbellford Memorial Hospital*, [1978] OLRB Rep. Aug. 722, *Sonora Cosmetics Inc.*, [1982] OLRB Rep. June 954, *St. Joseph’s Hospital*, [1984] OLRB Rep. Apr. 651 and *St. Joseph’s Hospital*, [1984] OLRB Rep. Sept. 1264. That is not the case here.

5. The Board’s jurisprudence does indicate that it may exercise its discretion under section 103(2)(i) when an applicant for certification has sought to withdraw the application after a vote has been directed and before the vote is held, if it appears that the trade union anticipated defeat in the representation vote and sought to escape the bar which would have been the consequence of defeat: *Mathias Ouellette*, 56 CLLC 18,026. It is also clear that the Board does not impose this bar automatically at the time of the dismissal if a vote has not actually been conducted. Rather, the propriety of a subsequent application within the six month period thereafter is considered only if and when such an application is filed: *Mathias Ouellette*, *supra*; *Fruehauf Trailer Company of Canada Limited*, [1973] OLRB Rep. Oct. 547. If such an application is filed in that period, the onus is said to lie on the applicant to show that special circumstances exist which would warrant the new application being entertained at that time. Because such an onus does arise in those circumstances, the Board’s practice when leave is sought to withdraw an application after a vote is directed is to dismiss the application and draw the parties’ attention to the Board’s decision in *Mathias Ouellette*, *supra*. That is what we would do here if we accepted the respondent’s argument that the applicant’s request to withdraw this application should be given the same treatment as it would have been given if made after a pre-hearing vote had been directed.

6. A vote had not been directed at the time the applicant made its request to withdraw. The respondent argues that this is a mere matter of timing, and says the circumstances must be examined to determine whether the motivation was to avoid an unfavourable vote. The difficulty with the respondent’s argument is the implicit assumption that a vote by the affected employees was inevitable and, further, that the union knew it was inevitable. No such



assumption is necessary when a vote has been directed. When a union's request to withdraw is made after a vote has been directed, a (rebuttable) inference that it expects defeat naturally arises because then, to the union's certain knowledge, no legal requirement other than success in the vote stands in the way of certification. That cannot be said before a vote is directed, and thus no such inference can be drawn, without first determining both that a vote would inevitably have been directed and that the union knew this was so at the time it requested leave to withdraw. That determination would require, in effect, that the Board complete the adjudication of an application which the applicant does not wish to pursue, for the sole purpose of determining who shall bear the burden of proof under subsection 103(2)(i) in the event the applicant applies again within six months. Whether or not it makes any sense to engage in what could amount to the full adjudication of a previous application in order to deal with a preliminary objection to the Board's adjudicating a subsequent application, it certainly makes no sense to do so before any subsequent application is filed. Because such an adjudication would be required before the burden of proof described in *Mathias Ouellette* could fall on the applicant, it would be inappropriate for us to warn the applicant that it will bear such an onus.

7. In the result, we propose to and hereby do no more than dismiss this application.

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**2115-84-M** United Brotherhood of Carpenters and Joiners of America, Local 2041, Applicant, v. **Ottawa G.S.B. Construction Co. Ltd.**, Respondent

**Arbitration - Construction Industry Grievance - Witness - Whether witness under subpoena obliged to produce documents relating to projects commenced after filing of grievance - Whether Board considering breaches occurring after filing of grievance relating to job sites not referred to in grievance**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *A. Grant* and *H. Kobryn*.

**APPEARANCES:** *David Jewitt*, *Don Guilbeault* and *Rick Lecompte* for the applicant; *Paul B. Kane* and *David Migicovsky* for the respondent.

**DECISION OF THE BOARD;** December 23, 1985

1. This matter involves the referral of two grievances to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. This decision relates to only one of the grievances, which is dated October 30, 1984.

2. This matter came before the Board for hearing on September 25, 1985. The hearing is scheduled to resume on January 6, 1986. At the conclusion of the hearing on September 25, 1985 a question was raised with respect to the propriety of the scope of a summons to witness which had been issued at the request of the applicant. The summons, as issued, requires that certain individuals bring a number of documents to the hearing. The respondent

contends that due to the time span covered by certain documents, they cannot be relevant to these proceedings. In the course of hearing the representations of the parties with respect to this issue, it became apparent that the parties also disagreed with respect to a second but related issue, namely, whether it is appropriate for a witness to be required to bring to the hearing documents that relate to job sites not referred to in the grievance.

3. The grievance with respect to which the summons to witness was issued alleges that the respondent violated the carpenters provincial agreement as follows:

On or about August 10th, 1983, the Respondent, Ottawa G.S.B. Construction Co. Ltd., hired certain employees to work on a project it was involved in at Hawkesbury Hospital. Initially, the Respondent, although bound to the provincial collective agreement, did not hire members of Local 2041 or of any other affiliated bargaining agent to work on this project. Grievances were filed and that matter was subsequently resolved with the Respondent agreeing to require his employees to become members of Local Union 2041.

Subsequent to the resolution of the above-noted grievance, the Respondent required certain of its employees (who had previously been non-union employees) to enter into piecework agreements with respect to the work being undertaken at the Hawkesbury Hospital project.

There is no provision in the aforesaid provincial collective agreement for employees to work on a piecework basis in any capacity at all. The wage rates, benefits, etc. are all based on an hourly rated scale set out in the agreement.

At all material times, the Respondent was fully aware of the provisions of the provincial collective agreement and the prohibition relating to piecework under that agreement.

The fact that the Respondent was requiring his employees to work on a piecework basis has only recently come to the attention of the Applicant as a result of other investigations being conducted by the Applicant into the Respondent's operations.

It has also just recently come to the attention of the Applicant that the Respondent has required and continues to require his employees to work on a piecework basis on a project in the City of Ottawa known as the Metropolitan Life building project located in the downtown core of Ottawa.

Throughout these two projects, the Respondent employer made certain remittances on behalf of his employees but falsified the actual number of hours worked, thereby reducing the appropriate amount of benefits to be paid pursuant to the agreement as well as the wages which should have been paid to its employees if they had been paid in accordance with the hourly rates contained in the collective agreement.

It has also recently come to the attention of the Applicant that the Respondent continues to put pressure on all of its employees to breach the terms of the collective agreement and attempts to offer individual piecework contracts to the employees, thereby undermining the rights of the Applicant to represent its employees in accordance with the terms of the collective agreement.

As a result of its investigation concerning both the Hawkesbury Hospital project and the Metropolitan Life project, the Applicant has now concluded that the Respondent has adopted a pattern of breaching the provincial collective agreement by requiring its employees to work on a piecework basis, but has attempted to hide this fact by fabricating certain dues and checkoff remittance forms for all of the employees within its employ. Accordingly, the Applicant requests an Order of the Board appointing an independent chartered accountant or, alternatively, an officer of the Board to examine the Respondent's books, payroll records, etc.

in order to certify that the employees within its employ are being properly paid wages and benefits in accordance with the provisions of the collective agreement.

4. The Summons to Witness, as issued, requests that the individuals summoned to appear before the Board bring with them, and produce, the following documents:

1. Copies of all construction contracts entered into by Ottawa G.S.B. Construction Co. Ltd. with owners, developers, general contractors, and subcontractors from November 1st, 1982, through until the present.
2. List of all construction projects worked on by Ottawa G.S.B. Construction Co. Ltd. from November 1st, 1982, through until the present.
3. Copies of any service contracts entered into by Ottawa G.S.B. Construction Co. Ltd. from November 1st, 1982, through until the present.
4. Copies of all T-4's and T-4A's issued to employees and subcontractors from November 1st, 1982, through until the present.
5. Weekly time sheets for all employees from November 1st, 1982, through until the present.
6. Weekly wage and subcontract expense summaries from November 1st, 1982, through until the present.
7. Individual employee earnings records from November 1st, 1982, through until the present.
8. Copies of the monthly remittance reports to Local 2041, i.e. the acoustical and drywall trust fund's report.
9. Cheque register from November 1st, 1982, through until the present.
10. Any other time sheets signed or submitted by employees themselves from November 1st, 1982, through until the present.
11. Any other documents that might in any way be relevant to these proceedings.

5. At the hearing on September 25, 1985, counsel for the applicant indicated that the applicant is not seeking a remedy with respect to any events which occurred prior to March 19, 1984, and that the applicant was agreeable that witnesses not bring with them any documents pertaining to events prior to that date. Counsel also indicated that the applicant was prepared to use the first day of hearing, namely September 25, 1985, as a final "cutoff" point for documents. Applicant's counsel contended, however, that witnesses should be prepared to produce documents related to events prior to that date but subsequent to the filing of the grievance, including documents which related to any new jobs which had commenced after the filing of the grievance. In this regard, counsel contended that the issue before the Board relates to the sub-contracting of work, and there should be no need for the applicant to file additional grievances with respect to this issue. In reply, counsel for the respondent contended that the cutoff date for any relevant evidence should be the date of the filing of the grievance, and that evidence should be limited to the two job sites referred to in the grievance.

6. Assuming that no privilege attaches to the documents in question, a person summoned to appear before the Board can be required to bring with him all relevant documents in his possession or under his control. Thus, to determine the proper scope of the summons to witness, we must first decide whether it is appropriate for the Board to consider events



which occurred after the filing of the grievance, and whether it is appropriate to consider occurrences on job sites that are not referred to in the grievance.

7. This propriety of considering breaches of a collective agreement alleged to have occurred after the filing of a grievance was discussed in *Re Beach Foundry Ltd. and United Automobile Workers* (1974) 7 L.A.C. (2d) 313 (Abbott) at pp. 324-325 as follows:

Finally I turn to the submission for the employer that my jurisdiction does not extend to the determination of any compensation payable for the period between the submission of the grievance to me for arbitration and the date of the initial hearing. I am not satisfied that the principle enunciated in *Russell on Arbitration* that the date of submission to arbitration marks a cut-off point is a principle which can or should be applied to the determination of damages for a continuing breach of a collective agreement in the labour relations context. I have been unable to find any previous award on the issue, nor was I referred to any by the parties' representatives. I find the arguments put forward by Mr. Burrows for the union to be highly persuasive. It appears to me that the arbitration stage in grievance resolution is generally treated by the parties as an integral part of the process. The observable fact is that a considerable delay can and most often does elapse between the conclusion of negotiations between the parties over a grievance and the actual hearing into the grievance by an arbitrator or board of arbitration. The decision to refer the matter to arbitration is almost invariably one which is confined by a time limit, that is to say, the party having carriage of the grievance must act to refer it to arbitration within a limited time or risk the loss of the right to refer the grievance to arbitration. But the period thereafter is subject to few if any time limits. (In this case, the parties in cl. 10.01 of their collective agreement have only provided that, after notice is given by one party to the other of its desire to submit a grievance to arbitration, there is a five-day limit on their efforts to mutually agree on an arbitrator after which they must jointly apply for the appointment of an arbitrator by the Minister of Labour.) What is important is that the parties cannot effectively by agreement set time limits on what then takes place. Neither party can, by its own efforts, shorten the period up to the hearing. Yet during that time, in the case of an alleged continuing breach of the collective agreement, losses can and likely will be incurred by the party who is the victim of the alleged breach. It seems unfair that that party be precluded from recovering those losses when, except in unusual cases, it could do nothing effective to reduce the period during which it sustains those unrecoverable losses.

It is not merely a matter of unfairness to preclude a party from recovering for losses occurring between the date of reference to arbitration and the date of the hearing. The only readily available method to ensure recovery, namely, the submission of a fresh grievance for each day the alleged breach continues after the date of submission to arbitration, is highly inconvenient and could lead to absurd and unintended results. Each one of these fresh grievances would have to be dealt with by the laid-down processes of meetings and negotiations. The party which is the victim of the alleged breach would be obliged to press each one of the grievances through each stage, up to and including arbitration, or risk the loss of each grievance through "want of prosecution". Carried to the extreme, each grievance, referred to arbitration, might result in divergent or conflicting awards on what would be essentially the same issue between the parties. Such a situation could not help but endanger the system for the final and binding settlement of disputes arising out of collective agreements.

For the foregoing reasons, I hold that my jurisdiction to fix and determine the compensation payable in respect of the continuing breach which I found to have occurred in my award of March 27, 1974, is a jurisdiction which extends throughout the period from the date on which the grievance arose (July 6, 1973) too and including the date of the initial hearing in this matter (February 28, 1974).

8. In *Williams Contracting Ltd.*, [1980] OLRB Rep. July 1115 a somewhat similar approach was adopted by this Board with respect to a construction industry grievance referred to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. In that case the Board stated:

29. The applicant is therefore entitled to a declaration that the respondent was bound by Schedule D (to the Operating Engineers provincial agreement) at all times material to the grievance and to the related relief it requested in its grievance. The grievance refers to a time period "May 13, 1979 and continuing", but refers to two specific job sites. The respondent did not raise any sound reason why this matter should not be seen as applying to all the work the respondent has performed in 1979 and 1980 outside Schedule D from the date of the grievance up to the date of this decision. It is accepted that a "collective agreement is fundamentally different from an ordinary commercial contract", and this is particularly the case in the construction industry. See *Blouin Drywall Ltd. and United Brotherhood of Carpenters and Joiners of America* (1976), 57 D.L.R. (3d) 199 (Ont. C.A.). The parties to such agreements have ongoing relationships and a continuing violation ought to be the subject matter of one grievance. One arbitrator ought to be able to speak to the totality of the difference between the parties and provide a meaningful remedy. On the other hand, the applicant provided the Board with no compelling justification for our relief to speak to the future in the nature of *quia timet* relief. There is no evidence before the Board that the respondent will continue to avoid its obligations under the schedule now that these obligations are clear. The Board retains jurisdiction in all other issues related to remedy and the implementation of this decision.

9. We are in agreement with the reasoning set out in the two cases referred to above. If in fact the respondent has breached the provincial agreement on the Hawkesbury Hospital and the Metropolitan Life building projects as alleged in the grievance, we believe it would be more appropriate for the Board to deal with any continuation of the breach subsequent to the filing of the grievance rather than require the filing of a fresh grievance on the part of the applicant.

10. Somewhat different considerations apply with respect to the issue of whether the applicant is entitled to rely on possible breaches of the provincial agreement on job sites not referred to in the grievance, including sites where the respondent may have commenced work after the date of filing of the grievance. The applicant has not specifically alleged that any breaches have occurred on other job sites. Rather, it appears to be seeking an opportunity to discover whether or not such other breaches have occurred.

11. In the *Williams Contracting* case referred to above, the Board's order appears to have been applicable to job sites in addition to those specifically named in the grievance. The effect of the Board's order, however, was only to bind the employer to a particular schedule to a collective agreement on a number of job sites. There was not a finding that the employer had actually breached the schedule on any job sites not referred to in the grievance. Another Board decision of some interest is *Sinclair Welding Limited*, [1981] OLRB Rep. March 331. In that case a company utilized a crane on a number of different construction sites. The company was bound to a collective agreement in the industrial, commercial and institutional sector of the construction industry, (the "ICI sector"), but not outside of the ICI sector. One of the issues before the Board was whether the job sites where the crane was utilized were within the ICI sector. The union filed 13 separate grievances, each one with respect to a different job site. The grievances were heard by the Board at the same time. During the hearing, union counsel sought to cross-examine the president of the company (a Mr. Wiles) with respect to certain other job sites. The Board's ruling not allowing such questioning is discussed as follows at paragraph 37 of the decision:

37. During the hearing, counsel for the applicant sought to question Mr. Wiles concerning job sites, other than those referred to in the grievances, where the respondent's cranes had been utilized. Counsel indicated that although he had no information concerning any possible further violations of the collective agreement, he felt he should be given an

opportunity to find out if there had been any. Counsel for the respondent strongly objected to this manner of proceeding. It appeared to the Board that both in the interests of fairness to the respondent, and the need to keep these proceedings within some manageable limits, evidence should be restricted only to job sites referred to in the numerous grievances referred to above, and the Board made a ruling to this effect. The applicant has requested that we reconsider and revise this ruling. However, having reviewed the reasons for making the ruling, we are satisfied that the ruling was in fact the appropriate one to make. The request that the Board reconsider and vary its ruling is accordingly denied.

12. In our view no hard and fast rule can be drawn as to when it would be appropriate to consider an employer's conduct on job sites not referred to in a grievance. However, we believe that care should be taken not to allow the proceedings to be turned into an open-ended "fishing expedition", or result in a situation where a respondent goes through a hearing without a fair indication of the case it has to meet. Further, as indicated in the *Sinclair Welding Limited* case, care must be taken to ensure that proceedings are kept within manageable limits. Taking these considerations into account, and having regard to the nature of the allegations raised in this case, we are of the view that it would be inappropriate in these proceedings to deal with possible violations of the provincial agreement on job sites other than those referred to in the grievance. This is, however, without prejudice to the right of the applicant to file grievances with respect to alleged violations of the agreement on other job sites.

13. Having regard to the foregoing, the Board is satisfied that the requirement in the Summons to Witness that witnesses bring with them certain documents should be restricted to documents that relate only to the Hawkesbury Hospital and Metropolitan Life building job sites. With respect to these two projects, the relevant time frame for documents is March 19, 1984 to September 25, 1985.

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**1093-85-U** United Steelworkers of America and its Local 9011, Complainant, **Radio Shack** Division of Tandy Electronics Limited, Respondent

**Duty to Bargain in Good Faith - Unfair Labour Practice - Whether non-adherence to pre-strike proposals unlawful - Whether less than generous offer made to union defeated in lengthy strike unlawful - Distinction between bad faith bargaining and hard bargaining - Pressing to impasse demand that unfair labour practice complaints be withdrawn illegal - But no violation found where union did not require removal of illegal demand**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *M. A. F. Stockton* and *C. A. Ballentine*.

**APPEARANCES:** *James Hayes* and *Nancy Makepeace* for the complainant; *L. Bertuzzi*, *M. J. Addario* and *W. A. Potter* for the respondent.

**DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER M.A.F. STOCKTON;** December 6, 1985

# I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent employer has contravened sections 15, 64, 66 and 80 of the Act. It is the second unfair labour practice complaint arising from the parties' most recent round of negotiations. The earlier complaint was filed in November 1984 and had two related aspects: an assertion that the respondent had bargained in bad faith; and an allegation that the discharge of a number of employees - purportedly for picket line misconduct - was really motivated by unlawful considerations. The parties in the earlier proceedings agreed to sever these two aspects of the complaint and proceed, initially, only with the bad faith bargaining issue. The propriety of the discharges would be considered later. After several days of hearing, the bargaining in bad faith allegation was dismissed for reasons given, at length, in a decision of the Board (differently constituted) dated June 14, 1985. The hearings concerning the discharges are currently ongoing.

2. The parties in the present proceeding agreed that, in the interests of economy, the Board should rely upon the factual findings and legal analysis made in the earlier case, without the necessity of further elaboration or formal proof. They were agreed that the current complaint can only be understood against the background of the earlier one, and the pattern of collective bargaining which the earlier panel of the Board has already thoroughly reviewed. In addition, since the thrust of the present complaint is primarily (but not exclusively) a new breach of the statutory duty to bargain in good faith, the Board was urged to consider the other panel's analysis of that issue.

3. With these agreements of counsel, the Board was able to complete the hearing in a single day and can render a decision with somewhat more abbreviated reasons than would otherwise have been the case. We see no need to undertake a general restatement of the content of the "duty to bargain in good faith", nor is it necessary to undertake a complete recitation

of the facts of the parties' particular collective bargaining relationship. Both can be found in the earlier Board decision, and similar legal questions have been explored in such recent cases as *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356, and *T. Eaton Company Limited*, [1985] OLRB Rep. March 491. (A useful summary of the law can also be found in the new edition of J. Sack and M. Mitchell, *Ontario Labour Relations Board Law and Practice*, (1985) at pp. 447-570.) However, it will be necessary to refer to some of the background in order to put more recent events in their proper perspective.

## II

4. The relationship between the union and the respondent dates back to November 1978, and got off to a very rocky start because of the respondent's flagrant unfair labour practices. The details of those unfair labour practices need not be outlined here (however, see the various *Radio Shack* decisions beginning in Board File 0274-78-U (unreported), and following with the reported decisions at [1978] OLRB Rep. Nov. 1043, [1978] OLRB Rep. Dec. 1128, [1979] OLRB Rep. March 248, and [1979] OLRB Rep. Dec. 1220). Even after the union was certified, the respondent refused to recognize its legitimacy. There was a long and bitter strike, as well as a finding by the Board that the respondent had committed "egregious" unfair labour practices and had not bargained in good faith (see the decision reported at [1979] OLRB Rep. Dec. 1220). The Radio Shack situation became something of a "high profile" case, generating much emotion, much litigation, and, at the time, considerable debate in the labour relations community.

5. Despite these inauspicious beginnings, the strike was eventually settled and the parties developed a working (if not warm) collective bargaining relationship. In September 1979, the company hired Mr. W. A. Potter to establish a personnel department and take over labour relations matters. Mr. Potter is a sophisticated and experienced industrial relations practitioner, having held a variety of personnel and labour relations positions with such employers as Smith Transport, Fibreglass Canada, Duplate, Benson & Hedges, and Reynolds Extrusions. He has acquired extensive collective bargaining experience dealing with unions such as the Teamsters, the UAW, the United Tobacco Workers, and the Steelworkers.

6. In the years following Mr. Potter's appointment, the relationship stabilized and even improved. In the second round of bargaining, the parties concluded a two-year collective agreement without the necessity of conciliation. In the third round of bargaining, the parties agreed to a further one-year agreement - again, without conciliation. The number of grievances was sharply reduced. In its June, 1985 decision, the Board observed:

38. In concluding that this phase of the complaint must be dismissed, we have not overlooked Union counsel's contention that the Board must carefully scrutinize the actions of the respondent, which Union counsel described as having been "one of the most notorious labour law violators in the Province". However, the egregious unfair labour practices described above were all committed over five years ago. The evidence adduced before us indicates that during the ensuing period, the parties have developed a viable collective bargaining relationship which has yielded three collective agreements, the two most recent of which were negotiated without even the intervention of a conciliation officer. There is no evidence that the Company has committed any unfair labour practices during the period covered by those collective agreements or during the bargaining which preceded the October 25, 1984 meeting [i.e., between December, 1983 and October 25, 1984]. While we do not doubt that the Company,

like many other employers, would prefer to operate without a union if it were in a position to legally do so, the evidence as a whole indicates that the Company is (and has for the past several years been) complying with its legal obligations under the *Labour Relations Act* in respect of collective bargaining with the Union.

We have no reason to disagree with that assessment.

7. The most recent round of bargaining did not go so smoothly. The union gave the company written notice to bargain on December 21, 1983, and took the position that substantial changes were needed in the areas of seniority, bumping rights and grievance procedures. In the company's view, such changes were neither necessary nor acceptable. There were a number of meetings between January and early May 1984, and various compromises were proposed, but none of them met with mutual acceptance. Despite the intervention of a conciliation officer and mediator, the parties were unable to compose their differences.

8. By early May it became apparent that there was a considerable difference of opinion on both non-monetary issues and the appropriate range of the monetary settlement. The parties' positions were quite far apart, and, at the time, totally irreconcilable. At a union meeting held on May 5, 1984, union representatives presented the employees with the company's outstanding "settlement offer" and urged them to reject it. They did. The majority voted in favour of a strike, and the union advised the company that a strike would commence on Monday, May 7, 1984. In response, the company implemented its first year wage offer, and indicated that it intended to continue operations with non-striking employees. The company also warned that disciplinary action would be taken against any striking employees who engaged in misconduct during the strike. There is no suggestion that there was anything illegal about any of these company positions.

9. The strike was a dismal failure. Despite considerable employee solidarity, the union was not able to significantly impede the employer's operations, and without that leverage, the company was unwilling to accede to the union's bargaining demands. The strike dragged on for several months. Periodic mediation efforts did not result in a mutually satisfactory compromise.

10. By October 1984, the union officials had come to the conclusion that the strike was lost and that the employees' bargaining objectives were probably not attainable. The union's focus then shifted to ways in which it could get its members back to work and protect those who might find themselves in jeopardy because of their conduct during the strike. Twenty-six employees faced criminal charges for alleged strike-related offences, and the union feared that the company would discharge a number of them. At the beginning of the strike, the company had warned that it would take disciplinary action if employees engaged in picketing behaved inappropriately. Without a collective agreement in place, the company would not have to demonstrate "just cause", nor would the company's decisions be subject to review by an arbitrator. Thus, from the union's point of view, it was important to get a collective agreement even if its terms were previously or from other perspectives considered unsatisfactory. The union was also worried that if the strike extended beyond six months, its supporters would not have a clear statutory right to return to their former jobs. [See section 73 of the Act.]

11. On October 25, 1984, the union purported to "accept" the company's "outstanding settlement offer" which had initially been made and rejected early in May prior to the commencement of the strike. At the same time, the employees purported to exercise their



statutory right to return to work under section 73 of the Act. The union took the position that, having accepted the company's outstanding offer, there was a collective agreement in place and there was no need for further negotiations; and, of course, if there was a collective agreement in place *before* the company took disciplinary action against the employees, such action would be subject to arbitral review. That was the union's objective. What the union did not know was that, anticipating a capitulation, the company had already discharged five employees and suspended two others. Whatever its legal consequences, the purported acceptance came too late.

12. The earlier panel of the Board characterized the timing of these discharges as a "lawful attempt to make them inarbitrable under the collective agreement which [the company] anticipated would be entered into later that day or shortly thereafter, and not an unlawful attempt to avoid entering into a collective agreement". The Board commented:

One of the issues on which "hard bargaining" may occur is the arbitrability of discharges and suspensions imposed during a strike for picket-line misconduct. The Act does not impose any legal obligation to arbitrate disciplinary action imposed during a strike. However, it is open to a union to attempt to use its bargaining power to obtain a decision on such disciplinary action or an agreement to refer it to arbitration. Similarly, it is open to an employer to attempt to use its bargaining power to resist reinstatement or arbitration, provided such resistance is not motivated by anti-union animus or a desire to avoid entering into a collective agreement.

We should also note that this issue was not a new one for these parties. During the troubled 1979 negotiations, they had agreed to arbitrate the discharge of two individuals accused of strike-related misconduct. In neither case was the discharge sustained - a result which troubled the company and strengthened its resolve in 1984, to resist submitting its disciplinary decisions to arbitral review.

13. The earlier Board panel had to consider whether, by October 25, 1984, there was still "an offer" outstanding for the union to accept; and whether, in the circumstances, the company's unwillingness to enter into a collective agreement embodying the terms of its May 2nd position, constituted a contravention of section 15 of the Act. In both cases the answer was "no". The May 2nd offer had already been specifically rejected, almost six months had elapsed and, over the course of the strike, the company had hired over 100 temporary replacement workers. The Board concluded that the earlier offer had expired and that there were legitimate "return to work" issues to be discussed - especially since the union had clearly lost the strike. The Board further held that the company was also legitimately concerned about the status of the individuals whom it believed had engaged in serious strike-related misconduct. The discharges did not demonstrate that it was unwilling to enter into any collective agreement at all and, in fact, came as no surprise. Indeed Frank Berry, a union official, was surprised that so few had been fired, given the larger number of outstanding charges. Finally, nothing turned on the failure of the company's representatives to provide a more detailed explanation of their position on October 25th, given the union representative's "repeated assertions that there was nothing to bargain about because the parties already had a collective agreement".

14. In the result, the Board dismissed the complaint and the parties were required to return to the bargaining table. At that point there had been no bargaining for about thirteen months. No meaningful negotiations had taken place while the employees were on strike between May 1984 and October 25, 1984. Thereafter, no bargaining took place because the union was asserting that there was a collective agreement in place.

15. It is not for us to comment upon the wisdom of the union's decisions to call a strike or pursue a complaint before the Board. The practical result was that, having been unsuccessful in both initiatives, it had to return to the bargaining table after a hiatus of more than a year and with virtually no bargaining power. Mr. Potter testified that never in his 25 years of experience had he represented an employer with such a commanding bargaining position. The company had successfully resisted the union's demands for concessions, weathered a long strike, and resisted the allegation that it had been bargaining in bad faith. It had "won" on all counts. It was now in a position to secure an agreement on its own terms.

16. Following the release of the Board decision, the parties agreed to meet on July 13, 1985 at a hotel in Barrie. The meeting began about 10:00 a.m., and was over by early afternoon. There was some bargaining and some movement, but no consensus and no collective agreement. The union takes the position that the employer stance taken on July 13th amounts to bargaining in bad faith and unlawful discrimination. Accordingly, it returned to the Board with the present complaint which was filed on July 31, 1985.

17. Before examining the company position taken on July 13th, it may be useful to refer briefly to certain features of the company settlement offer rejected in May 1984, then purportedly accepted six months later. It may also be useful to refer once again to some of the comments made by the Board in its earlier decision.

18. In May 1984, the company had been unwilling to accede to the union's demand for significant monetary gains and changes in the areas of seniority, bumping rights, temporary transfers, and grievance time limits. The company was only willing to "fine tune" the status quo. The company's monetary proposals were also relatively modest: a three-year collective agreement with a four per cent across the board increase effective on ratification, an additional three per cent effective March 13, 1985, and a further three per cent effective March 13, 1986. This offer was not particularly generous, but neither was it completely out of line with other settlements being negotiated at the time. There is nothing in the events after May 1984 which would prompt the company to offer more.

19. The Board in the earlier decision noted that, with the passage of time, the company could legitimately expect to bargain about questions of contract term, the return to work of striking employees, and the status of the individuals accused of strike-related misconduct. In the Board's view, there was nothing improper in the employer's resistance to reinstating the accused employees, or its refusal to submit their cases to arbitration. The May 2nd position was no longer "on the table", and all of these new issues could legitimately be raised.

20. Frank Berry testified that he expected the company's settlement proposal to be totally and predictably unacceptable to the union bargaining committee. In his opinion, the company intended to propose settlement terms so unpalatable that no "self-respecting union" could accept them. In Mr. Berry's opinion, the company's real objective was to avoid any collective agreement at all with the applicant union. Indeed, so firm was he in this conviction that, he testified, he did not pay much attention to the company's explanation for some of its proposals.

21. The company's opening position on July 13, 1985 (exhibit 3) was somewhat different from its position on May 2, 1984 (exhibit 1). Many items were the same, but there

were certain elements which were different. The company had already implemented a four per cent across the board wage increase, effective on March 12, 1984. It now proposed an additional three per cent across the board increase, effective May 1, 1986, in a collective agreement that would expire April 30, 1987. In other words, in addition to a minor adjustment of the term of the agreement, the employer had dropped the 1985 three per cent wage increase which it had earlier offered prior to the strike. It had decided not to implement and make retroactive a wage increase for the period when employees were on strike or taking the position that no bargaining was necessary because there already was an agreement. This was particularly annoying for the union, because that summer the employer had granted a five per cent increase to its office and salaried staff.

22. Mr. Potter explained that the company had an established practice of conducting an annual salary review for its salaried personnel. The wages paid to salaried employees were not linked to those of the employees in the bargaining unit. On three occasions since 1979, the annual salary revisions for non-bargaining unit employees were comparable to those negotiated for employees in the bargaining unit. On four occasions they were different. Counsel for the company argued that the "4-3-3" offer of May 1984 had been an offer for settlement without a strike of a three-year agreement guaranteeing three years of labour peace. Instead, there had been a six-month strike and a refusal by the union to bargain between October 1984 and the end of June 1985. By that time the bargaining context was entirely different.

23. Another company proposal was the specification that time spent on strike would not be credited towards "seniority" for certain purposes under the collective agreement: stock participation plan, vacation service entitlement, job progression on the wage scales and personal day plan, and there would also be an adjustment to the earned vacation entitlement in 1985. These conditions were not new, having been the company's response to the employees' unconditional application to return to work in October 1984. Mr. Berry did not focus on these items either in formulating the union's response on July 13th or in his evidence before this Board. Nor were they raised in the earlier complaint or particularized in this one. We might also note that it is not unusual for an employer to try to avoid future interpretation problems by limiting the accumulation of seniority to periods of "active employment" or time "actually at work".

24. More troubling for the union was the following proposal:

#### 7. INCENTIVE PLAN(S)

The Company has the right to introduce an incentive plan or plans for all or part of the employees in the bargaining unit. All details of the plan(s), including but not limited to eligibility and payments thereunder, will be determined in the exclusive discretion of the Company and cannot be made the subject of any grievance. The details of any plan introduced will be posted on the bulletin board. Employees eligible under a plan will not be paid less than the wage or mileage rates set out in the collective agreement.

Mr. Berry viewed this proposal as one which would permit the company to discriminate against union supporters and "reward" objectors - although he conceded that the company might be able to introduce such plan even without specific contract language. The company indicated that it was not its intention to discriminate against anyone. In an effort to improve productivity, it was exploring the implementation of "quality circles" in which work *groups* would receive



rewards for improved group performance. The exact nature of such rewards had not been settled, but the company had in mind the kind of incentive plans which it already had for other employees across Canada involving prizes, such as trips, merchandise discounts, free dinners, or even cash. Awards would be made on a team basis and would not impact upon the negotiated rates of pay.

25. The most disturbing proposal from the union's point of view was the following:

10. The Union agrees that all conditions in the employees' Return to Work letters of November, 1984 (sample copy attached hereto) are hereby confirmed. Further, all current job assignments are hereby confirmed and will not be the subject of any grievance or Complaint.

11. The Union agrees to withdraw all outstanding grievances and Labour Board Complaints and further agrees that no grievances, Complaints or actions will be instituted with respect to any incident which occurred [sic] up to and including the date of ratification.

The reference to "outstanding...Labour Board Complaints" relates to the "second phase" of the earlier complaint, which is still pending before the Board: namely, that five individuals were discharged and two suspended not for strike-related misconduct as the employer maintains, but rather for legitimate trade union activity protected by the statute. We shall have more to say below about this aspect of the company's proposal. At this point, it is sufficient to note Mr. Berry's evidence that it is not unusual, as part of a final settlement, to attempt to "wrap up" all outstanding legal matters or grievances. That had been part of the 1978-79 settlement process and is a common concern for all parties in the bargaining process. Mr. Berry indicated that the proposal came as no surprise and that ordinarily one doesn't strike over such issues. He also admitted that the *union's* last proposal prior to the strike was a demand that the *company* forego its right to initiate proceedings in respect of an allegedly unlawful work slowdown which had occurred during the course of bargaining. The union hoped through bargaining, to avoid litigation and to protect itself and its members against a finding of liability.

26. While the union was disappointed with the company's settlement offer, and had real doubts about the company's motivation, it was still prepared to negotiate. Unfortunately, its counterproposal was as "predictably unacceptable" as that of the company, and, we are constrained to note, somewhat unrealistic in the circumstances. The union proposed (*inter alia*) that the company reinstate the five discharged employees with no backpay and that, in return, the union would withdraw its complaints before the Ontario Labour Relations Board and all outstanding grievances. This represented a compromise of the two suspensions, but also a continued insistence on the return to work of the five individuals accused of strike-related misconduct. Of course, this is precisely what the company refused to do, having made its position abundantly clear during the course of the earlier proceedings. In addition, the union sought to confirm the four per cent wage increase already implemented in May 1984 and secure a further three per cent increase on February 12, 1985, a three per cent increase on July 15, 1985, and a five per cent increase on July 15, 1986, in a collective agreement to expire on February 12, 1987. This represented a monetary demand more generous than the union had rejected in May 1984, then purportedly accepted six months later. From the company's point of view, this proposal was not even "in the ballpark".

27. After further consideration the union made another proposal. This time the union indicated that it would withdraw all complaints from the Labour Board and all outstanding

grievances if the employer would arbitrate the discharges of the five accused employees. The union submitted that in the absence of an agreement to arbitrate, the company's proposal to withdraw all Labour Board proceedings was illegal. The union further suggested a monetary package confirming the four per cent wage increase on May 6 1984 and providing for a five per cent wage increase on July 15, 1985, and a further five per cent increase on July 15, 1986. Once again, this monetary demand was not only much higher than the company's current proposal, but also more generous than the pre-strike company offer which the union had initially rejected, then purportedly accepted six months later. The proposal to arbitrate the discharges was one which the company had already rejected.

28. Mr. Berry explained that there had never been any doubt about the company's ability to pay. It had recently sent a letter to all employees in Canada thanking them for contributing to a prosperous year. Since the local salaried employees had received (on average) a five per cent salary increase, it was the union's view that the same increase should be available to bargaining unit employees and, further, that five per cent was the appropriate bench mark for 1986. It is not obvious why the arbitration proposal should now be acceptable when it was not acceptable before, nor is it obvious why the company would be prepared to pay more than the union was willing to accept in October 1984.

29. From the company's perspective, the revised union proposal was no more acceptable than the earlier one. There was still an insistence on arbitration of the discharges which, in light of its experience in 1979, the company had always adamantly refused. The union was also seeking a monetary package inconsistent with the company's previous proposals and even more "out of line" with the company's present offer. Both sides concluded that they were "spinning their wheels" and negotiations broke down. Two and a half weeks later the union filed the present complaint.

### III

30. As we have already indicated, much of the law has already been canvassed in previous proceedings involving these same parties and it is unnecessary to duplicate that analysis here. However, certain statements drawn from earlier cases bear repeating:

- (1) ...[section 15] of the *Labour Relations Act* is not intended to redress any imbalance of bargaining power that may exist between the parties. A party whose bargaining strength allows it to force the acceptance of hard terms at the bargaining table does not thereby bargain in bad faith. The very word "bargain" presupposes that the parties will seek to maximize their own best interests. Hard bargaining, albeit ruthless, is not bad faith bargaining. (from *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65.)
- (2) There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the company was bargaining in bad faith....There is no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self-interest and without evidence to suggest that the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application. (from *C.C.H. Canadian Limited*, [1974] OLRB Rep. 375).

- (3) Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. (from *Radio Shack*, [1979] OLRB Rep. Dec. 1220).
- (4) The content of the agreement is for the parties to determine in accordance with their own perceived needs and relative bargaining strength. The legislation enables employees to combine together to bargain collectively and compels the employer to recognize their bargaining agent. It further provides a framework within which there can be an exploration of the parties' differences and a sincere effort to reach some accommodation...but the statute does not *require* any particular concessions, nor does it stipulate the content of a collective agreement or even that a collective agreement always must be the necessary outcome of the parties' bargaining....Rational discussion is an important aspect of the bargaining process. So is power. Persuasion is an effective tactic to gain one's bargaining objectives. So is economic pressure....A party whose bargaining strength allows it to virtually dictate the terms of the agreement does not thereby bargain in bad faith, and that proposition is applicable whether it is the union or the employer which "has the upper hand". (from *Canada Trustco Mortgage Company Limited*, [1984] OLRB Rep. Oct. 1356.)

These passages merely underline a basic characteristic of our collective bargaining system: bargaining power is the ultimate arbiter of the clash between management's drive for productive efficiency, and the workers' demand for job security and a bigger share of the "economic pie". Parties strike their own bargain, based upon a realistic appraisal of the value of their objectives in relation to their ability to obtain them. Unless the parties' bargaining power is relatively equal (a situation not compelled by statute), the agreement will inevitably reflect the wishes of the stronger party.

31. We think it is also important to bear in mind the sage observations of Professor Archibald Cox in his seminal article in the 1958 *Harvard Law Review* (v.71, no.8, p.1401 at 1440):

There is also a danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the *Truitt* negotiations bears ample evidence of the jockeying of lawyers [*Truitt M.F.G. Co.*, 110 N.L.R.B. 856]. Hammering out a labour agreement requires all the negotiator's skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour-practice case diminishes the likelihood that the negotiations will be successful.

In the same vein, the former Chairman of the Board wrote in the 1979 *Radio Shack* case:

On the other hand this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement - a commitment which is more and more self-evident as parties proceed together beyond their first collective bargaining agreement. Too penetrating a review by this Board will only insert it as a third party in the bargaining arena to be tactically used by the negotiators, deferring their attention from the principle task at hand.

The Board has an obligation to ensure compliance with the law, but litigation should not be regarded as a substitute for bargaining or bargaining power; nor should the Board's process be viewed as the means of salvaging an untenable bargaining position, or securing an otherwise unobtainable bargaining objective.

32. Leaving aside for the moment the company's demand to drop the unfair labour



practice proceedings pending before the Board, we are of the view that all of its other proposals are properly characterized as "hard bargaining". There is nothing unusual in the fact that the employer's bargaining position may have changed between May 1984, and July 1985. In a volatile strike situation, the parties' demands may well change in accordance with economic circumstances and their tactical assessment of the effectiveness of their own bargaining power. A successful strike may prompt the union to escalate its demands so that a company offer which may have been acceptable prior to the strike no longer looks so attractive. Similarly, a company may be prepared to make an offer prior to a strike in order to avoid its potential impact, which the company is not prepared to make once it has taken a strike or it has been demonstrated that the impact of the strike has been overestimated. A change of position resulting from the interplay of market conditions and relative bargaining power does not, in itself, constitute a breach of the duty to bargain in good faith; moreover, here, *neither* party adhered to its pre-strike proposals. On July 13, 1985, the company advanced a monetary proposal less generous than it was prepared to accept to avoid a strike in May 1984, but the union submitted a monetary demand greater than that contained in the position which it had purportedly accepted some eight months before. In this and in other stated positions (again, excepting, for the moment, the demand to withdraw pending unfair labour practice complaints), we are satisfied that the employer was merely engaging in "hard bargaining" based upon its demonstrably superior bargaining power.

33. The fact that the company's proposals may not have been acceptable to the union, does not mean that the company was not prepared to enter into a collective agreement - albeit on its own terms; nor is it really very helpful to suggest that the proposals were "predictably unacceptable". That characterization is equally applicable to the union's proposals, and if that were the test for a breach of section 15 of the Act, then the legality of a party's bargaining stance would turn on the willingness of the other side to accept it. It may be that a union's failure to achieve its stated goals will diminish its stature in the eyes of its members and make it less attractive to prospective members. But this does not mean that employer resistance is illegal. The union may simply have overestimated its ability to wring concessions from an unwilling employer and misjudged the effectiveness of its strike weapon.

34. This is not to say that the Board is totally unconcerned with the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. In some circumstances, the Board may well have to assess the content of the items tabled in order to determine whether an employer does not really intend to enter into any collective agreement or whether it is really refusing to recognize the union as the exclusive bargaining agent (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397; *Irwin Toy Limited*, [1983] OLRB Rep. July 1064, and, particularly, *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136). Bargaining proposals may provide evidence of such unlawful motive, and the Board may also review the content of those proposals to assess whether any of the proposed items is "illegal" (see *infra*). However, in general, the Board's role under section 15 of the Act is one of monitoring the *process* of bargaining, and not the *content* of the proposals advanced.

## IV

35. We turn then to the company's demand that the union withdraw the unfair labour practice complaints currently pending before the Board. The union contends that this was an "illegal demand"; or, at least, that if the matter was negotiable, then it was illegal for the company to "press it to impasse". In counsel's submission, the company is not entitled to make statutory rights the subject of an exercise of bargaining power. The company cannot demand that, as a condition of settlement, the union withdraw the pending complaints and compromise such employee rights or remedies as may be available to them under the statute.

36. We are inclined to agree with the union's general proposition that, however broad the scope of bargaining, it does not encompass demands which are illegal or inconsistent with the scheme of the *Labour Relations Act*. A simple example would be a union's insistence on maintaining the right to strike to enforce compliance with a collective agreement, when the Act quite clearly provides that such matters must be resolved by arbitration. Another simple example might be a union demand for a wage increase beyond the ceiling provided in wage restraint legislation (see *Croven Limited*, [1977] OLRB Rep. March 162), or an employer demand which interfered with internal union affairs or the representation of employees by a union (see the discussion in *A.N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504 at paragraphs 10-13). More subtle was the situation in *United Brotherhood of Carpenters & Joiners of America*, [1978] OLRB Rep. Aug. 776. There, a trade union certified to represent employees in a specific geographic area, struck to force the employer to extend recognition beyond the bounds of the Board certificate. The Board held that this was tantamount to a recognition strike. It was an illegal demand which was inconsistent with the scheme of the Act and contrary to the duty to bargain in good faith. Although the parties were entitled to negotiate about the scope of bargaining rights, a dispute could not be pressed to impasse. Similarly, in *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811, the Board held that it was illegal for a union to threaten a strike in order to secure a particular work assignment when section 91 of the Act provided a statutory mechanism for resolving disputes of this kind. In both cases the Board observed that it was lawful, and often sensible, to raise those matters at the bargaining table and seek to resolve them through negotiations. But neither party was entitled to use its superior bargaining power to force the other party to forego rights or abandon remedies available under the statute.

37. In our view, that approach is equally applicable here. It would be abhorrent and contrary to public policy if an employer could rely on its superior bargaining power to avoid the consequences of its own illegal acts. Continued bargaining or willingness to enter into a collective agreement cannot be made dependent upon the acceptance of provisions in that agreement which, in their effect, are repugnant to the Act's specific language, protections, or basic policy. We do not think that an employer is entitled to rely upon its superior bargaining power to compel the withdrawal of a pending unfair labour practice complaint, nor can it make the signing of a collective agreement contingent upon such withdrawal. To do so would be interfering with the union's right to represent those employees, and penalizing other members in the bargaining unit because the discharged workers were seeking legal vindication. To hold otherwise would make the employees' statutory rights illusory, and subject to the balance of bargaining power rather than the rule of law.

38. The problem posed by this case is not the validity of the general proposition urged upon us by the union, but rather its application to the circumstances under review. As we have already noted, it is not illegal to raise outstanding complaints at the bargaining table or to seek a resolution short of litigation. It will often make good sense to do so. The Act itself contemplates and encourages settlement discussions and Mr. Berry testified that it was quite common to attempt a settlement of these matters at the bargaining table. That is what happened here.

39. At the meeting on July 13, 1985, the union did not refuse to discuss the outstanding unfair labour practice complaints, nor did it insist that the disposition of those complaints should be determined solely by the Board and not at the bargaining table. On the contrary, that issue was just one of several on which proposals were made and modified. It was an important issue for the union, but only one of several and not manifestly more important than, for example, the wage proposals. The union was prepared to withdraw the complaints if the company would reinstate the discharged employees without pay (in effect, an 8-1/2 month suspension), or would submit their cases to arbitration. In the union's bargaining proposal, the company's alleged illegality was linked to the company's perfectly lawful refusal to do either of these things - a position which it had maintained since October 1984. At no time did the union spokesmen state unequivocally that the matter was not a proper subject for negotiation or demand it be removed from the bargaining table. Nor did union spokesmen ever demand that the company table a bargaining position absent item 11. If the company had refused to do so, or if the company had tabled a response which could be construed as a "penalty" for refusing to forego statutory rights, the union might well have been able to make a successful complaint to this Board. But the bargaining never really got that far. The union never squarely put to the company the position now put to this Board, and thus the Board is not in a position to assess the company's response.

40. If it is said that this is an unduly technical reading of section 15 of the Act, it must be remembered that we are dealing here with issues that are clearly negotiable, frequently negotiated, and were resolved through negotiations between these same parties in the past. The compromise of a possible statutory claim was something the union itself raised earlier in the bargaining. If the union is now claiming that the company acted illegally by refusing to remove a similar item from the bargaining process, it is our view that it was incumbent upon the union to put that proposition directly to the company to give it an opportunity to respond.

41. For the foregoing reasons, the union's complaint is dismissed, and the parties will have to return to the bargaining table and try to compose their differences in light of the legal framework and practical realities dealt with in this decision.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I dissent from the majority decision. In my view, the "leopard has not changed its spots". The company has not changed its motive, only its methods. It remains determined to undermine the union and convince its employees that they will not benefit from collective bargaining. The company's entire package was designed for rejection. It believed that it had the union at its mercy, and knew that no self-respecting union could accept conditions so discriminatory to its membership.



2. The Board stated in the *Irwin Toy Limited* case, [1983] OLRB Rep. July 1064 at paragraph 15 that:

15. It is contrary to the Act to either punish or reward employees because of their preference for union representation. (See *Empco-Fab Ltd.*, [1982] OLRB Rep. Aug. 1162; *Peabody Coal Company*, (1982) 111 LRRM 1480; *NLRB v. Rubatex Corp.*, (1979) 601 F 2d 147, 101 LRRM 2660 (U.S.C.A. 4th Cir.)) It is also a violation of the duty to bargain in good faith for an employer to advance, without any economic justification, an offer to its unionized employees which is intended as a message that they will suffer economically as long as they choose to be represented by a union or exercise the rights of organized employees. For example, the Canada Labour Relations Board has recently found that an employer violated the *Canada Labour Code* by bargaining to impasse collective agreement terms which it found were intended to reward employees who did not participate in a lawful strike and punish employees who did. (*Eastern Provincial Airways Ltd.*, decision dated May 27, 1983, as yet unreported).

In the instant case, the company's proposal dropped the three per cent 1985 wage offer made prior to the strike, however, the non-union workers were awarded a five per cent increase. There is no doubt about the company's ability to pay. The company boasted in a letter dated June 30, 1985 that it had a successful year. It also proposed an incentive plan that would give the company the exclusive discretion on details, without the union having the right to grievance. Above all, it proposed that the union withdraw all outstanding complaints, including those currently pending before the Board. When the company's conduct is considered as a whole and against the background of its prior history, I would conclude that it has not bargained in good faith. It has adopted a stance without clear economic justification, designed to penalize union members, undermine the union and impede its ability to represent employees. I would have sustained the complaint.

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**0186-84-JD Spruce Falls Power and Paper Company Limited, and Kimberly-Clark of Canada Limited, Complainants, v. International Brotherhood of Electrical Workers, Local 1149 and Local 89, Canadian Paperworkers Union, Respondents**

**Jurisdictional Dispute - Practice and Procedure - Board member falling seriously ill after 16 days of hearings completed unable to continue - Act no permitting substitution of panel member incapacitated by illness or death - De novo hearing before new panel directed**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *C. A. Ballentine* and *R. J. Gallivan*.

**APPEARANCES:** *D. K. Gray* and *J. Mongeon* for the complainants; *S.B.D. Wahl*, *G. Ryan*, and *Wm. Moore* for International Brotherhood of Electrical Workers, Local 1149; *W. Dubinsky*, *Peter Pellow* and *Louis Hachey* for Local 89, Canadian Paperworkers Union.

**DECISION OF THE BOARD;** December 4, 1985

1. The name: "Canadian Paperworkers Union, Local 89" appearing in the style of cause as the name of one of the respondents is amended to read "Local 89, Canadian Paperworkers Union".
2. This complaint was filed on April 18, 1984 and hearings were first held on July 11th, 12th and 13th, 1984. 16 days of hearings have been held to date before a different panel of the Board than herein, with the sixth witness in these proceedings currently being examined. A further six days of hearings had been set when the proceedings last were adjourned. 59 exhibits have been filed.
3. During the adjournment the employer member of the Board hearing the complaint has become too ill to continue sitting. Thus, the Board and the parties are faced with the problem of whether these proceedings can be continued in circumstances where one of the Board panel is unavailable.
4. The parties attempted unsuccessfully to resolve either the procedural issue or the merits of the complaint. There was no consensus for the Board to substitute another member for the incapacitated member. On October 22, 1985 the parties made able and comprehensive submissions to the Board herein on the options available for dealing with the dilemma. The Board intends only to summarize the parties' submissions to show their main thrust, but it has reviewed and considered carefully their full submissions.
5. The complainants were prepared to consent to the Board substituting another member for the incapacitated member and continue the proceedings from the point at which they were adjourned. That consent was premised on the complainants' understanding that the Board itself believed that it did not have jurisdiction to substitute in that manner without consent of the parties. The respondent International Brotherhood of Electrical Workers, Local 1149 ("the IBEW") also agreed to replacement of the one panel member by another Board member and continuation of the proceedings. The respondent Local 89, Canadian Paperworkers Union, ("the CPU") would agree to substitution and continuation only if substitution was made for the employee representative as well so not to "imbalance" the panel.

6. Complainants' counsel takes the position that the Board should not substitute, absent consent of the parties, unless it is secure enough in its jurisdiction to do so that it would not be at risk of being overturned on judicial review. Counsel argues that the *Labour Relations Act* does not give the Board clear power to substitute one member for another where a panel is seized with the proceedings before the panel. Therefore, were the Board to attempt to do so, it would be violating the principle of he who hears must decide. The current law in that respect, counsel submits, is *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69 and O.L.R.B.* 85 CLLC 14,031. The CPU adopts the complainants' position and expands upon it by arguing that the Board should not substitute for one Board member of a panel without substituting for the other. IBEW counsel argues that the Board's mandate under the Act must be carried out in the spirit of the principle that labour relations delayed is labour relations denied and the Act must be interpreted in the same spirit. Accordingly, when section 102(13) is read in that context together with section 102(7) and subsections 1 and 11 of section 102, it is reasonable to construe the Board's discretion under section 102(13) to decide its own practice and procedure, as being broad enough to allow it to substitute a member of a panel in the present circumstances. IBEW counsel also argues that it would be a denial of natural justice for the Board either to substitute both the employer and employee representatives on the panel when only the employer representative is unable to continue, or to begin the case again after 16 days of hearings because of the attendant expense, delay and inconvenience which would be inflicted on the parties.

7. The *Labour Relations Act*, unlike provisions contained in the *Courts of Justice Act*, 1984, S.O. 1984, c.11 and the *Canada Labour Code*, does not contain any provision which would enable the Board to replace a member of a panel who is unable to complete his or her duties because of illness or, for that matter, death. The only subsection directly on point in the *Labour Relations Act* is section 102(7) which on its clear wording only deals with those situations where a Board member resigns but is still capable of sitting. The subsection authorizes that member to continue to sit and to fulfill any outstanding duties or responsibilities, but that provision cannot be construed as giving the Board the power to deal with the situation confronting it herein. The Board is quite clear that, absent consent of the parties, it has no jurisdiction to make the substitutions proposed by the complainants and the IBEW or the CPU.

8. In the Board's view, the lack of such a provision in the *Labour Relations Act* must mean that the Board has no jurisdiction either to substitute for the incapacitated member of the panel in the midst of the proceedings, or to continue and complete the proceedings with the two remaining members. Therefore, the Board directs the Registrar to list this complaint for hearing *de novo* before a new panel of the Board.

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**3437-85-R; 3438-85-R; 0434-85-M** Sheet Metal Workers International Association Local 537, Applicant, v. Gerhard Andreas Schaefflein, c.o.b. as G.S. Sheet Metal, and S.N. Ventilation Heating Limited, c.o.b. as **Steve's Sheet Metal Company**, Respondents

**Related Employer - Sale of a Business - Principals of two companies having business association and assisting each other - No common ownership or partnership - Evidence not showing scheme to prevent detection of jobs by union - Mischief of provisions not present - Sale and related employer applications dismissed**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *R. W. Pirrie* and *W. F. Rutherford*.

**APPEARANCES:** *Stanley Simpson* and *O. Pettipas* for the applicant; *Gerhard Andreas Schaefflein* for G.S. Sheet Metal; *Sveto Dojcinovic* for Steve's Sheet Metal Co.

#### **DECISION OF THE BOARD;** December 20, 1985

1. These are consolidated applications under sections 63, 1(4), and 124 of the *Labour Relations Act*. Initially the allegation was that the respondent Gerhard Schaefflein, carrying on business as G.S. Sheet Metal Company, was a "successor" or "related" employer to S.N. Ventilation and Heating Limited, carrying on business as Steve's Sheet Metal Company, and accordingly is bound to the latter company's industrial, commercial and institutional collective agreement for the Hamilton area. At the end of the evidence, however, the "sale" application under section 63 was withdrawn. The grievance referrals under section 124 were filed against both G.S. Sheet Metal and Steve's Sheet Metal, and were held in abeyance pending a determination of the section 63 and 1(4) aspects of the case.

2. The evidence tracks a long period of friendship and business association between the two principals here involved, Gerhard Schaefflein and Steve Dojcinovic. Mr. Schaefflein entered the sheet-metal contracting business first, operating largely under the name S & S Sheet Metal throughout the 1970's. Under Mr. Schaefflein's direction, S & S grew into the major residential sheet metal contractor in the City of Hamilton, and in 1974 Mr. Schaefflein agreed to enter into a collective agreement with the applicant for work in the residential sector. In 1973 Mr. Dojcinovic arrived in Canada, and attempted to carry on his trade of sheet-metal working. He discovered, however, that his credentials did not qualify him to work here, and initially had great difficulty finding work. Finally he was taken on as an apprentice at S & S Sheet Metal by Mr. Schaefflein, who in fact carried him during his apprenticeship at a wage higher than that to which he was technically entitled. Mr. Dojcinovic and the other employees of S & S were taken by the applicant into a "B" local formed solely for the purposes of the residential agreement signed by Mr. Schaefflein, but none of them were allowed into the full Local itself, unless they were prepared to pay the \$1,150 initiation fee.

3. Mr. Dojcinovic continued to work as a shopman for Mr. Schaefflein until 1977, when Mr. Schaefflein suffered a heart attack and decided to sell the business. Mr. Schaefflein himself got out of the sheet-metal business entirely at that point, and went into selling real estate. There was, in fact, a covenant in the agreement of purchase and sale that Mr. Schaefflein not compete in the business for 5 years within a radius of 100 miles of Hamilton. In 1979,

however, the new owner of S & S Sheet Metal began to default on his payments to Mr. Schaefflein, and Mr. Schaefflein went back into the sheet-metal business with his brother, who, because of possible litigation over the restrictive covenant, appeared as the nominal owner of a number of related companies, one of which by 1981 was carrying on business under the name "G.S. Sheet Metal Company".

4. Mr. Dojcinovic, meanwhile, had continued to work for S & S. When Mr. Schaefflein had become incapacitated, and prior to the time the business was actually sold, Mr. Dojcinovic did his best to assist Mr. Schaefflein in the running of the business. Once the business was sold, Mr. Dojcinovic, by this time a qualified mechanic, registered himself as a subcontractor under the name "Steve's Sheet Metal Company" and continued to perform work for S & S Sheet Metal. With Mr. Schaefflein out of the business, however, S & S Sheet Metal went into steady decline, and Mr. Dojcinovic found himself doing increasingly more work on his own, on jobs that he found for himself. Mr. Schaefflein was the only contractor that the applicant was able to persuade to sign the residential agreement, and after his withdrawal from the business, the concept of the residential or "B" Local fell into abandonment.

5. By 1980, Mr. Schaefflein was, as noted, again back in business, and he and his brother had a large job to carry out in Windsor. His brother, however, was unhappy with the situation in Canada, and returned to his native Germany. At almost the same time Gerhard Schaefflein suffered another heart attack, and again Mr. Dojcinovic took over completion of the job in Windsor for him, as a subcontractor, while Gerhard himself returned to Germany. As Mr. Dojcinovic continued to carry out jobs on his own behalf he gradually built up a supply of tools and equipment, and in 1981 he set up a shop at his present location on Parkdale Ave. North.

6. By the end of 1981, Mr. Dojcinovic found he had more work than he could handle, and when Mr. Schaefflein returned from Germany, he asked Mr. Schaefflein to help him. Mr. Schaefflein agreed, but, concerned about his health, and wishing to continue his activities as a free-lance estimator as well as a real estate broker, refused to go on the payroll full-time. Mr. Schaefflein in fact did a great deal to help Mr. Dojcinovic, who at that time trailed well behind Mr. Schaefflein in both experience and facility with the English language. Mr. Schaefflein occupied a desk and drawing table at the back of Mr. Dojcinovic's office, and generally did the estimating for Mr. Dojcinovic (as he did, to a much lesser extent, for other contractors) and assisted in the running of jobs. With a job that Mr. Dojcinovic had in Timmins, for example, Mr. Schaefflein would volunteer to fly up and check on progress just for a diversion, receiving no pay but only his expenses. Mr. Schaefflein was not, in fact, paid for each job anywhere close to what his services to Mr. Dojcinovic appear to have been worth, but testified that Mr. Dojcinovic would repay the favour with items like an airline ticket to Germany, or would give him something on another job.

7. Towards the end of 1983 (there is nothing in the evidence to fix the precise time), the job inventory of Steve's Sheet Metal began to diminish, and Mr. Schaefflein began to seek out some small jobs to do on his own, under the revived name of "G.S. Sheet Metal Company". He used his home as his office, and as well continued to make use of the desk and drawing-board at the rear of Mr. Dojcinovic's office. Most of his hours in the day-time continued to be spent in Mr. Dojcinovic's office, working at the back on either his own contracts, or preparing estimates for the use of Mr. Dojcinovic. Free-lance estimating is not an uncommon feature of this industry, and when Mr. Schaefflein was not available,

Mr. Dojcinovic had other contractors that he used to provide him with the "take-offs" required for framing a bid.

8. Also towards the end of 1983 Mr. Dojcinovic successfully bid on an "i.c.i." job for the Salvation Army. Just prior to that, a Union member by the name of Bob Woods, with whom Mr. Dojcinovic and Mr. Schaefflein had worked in the early days at S & S Sheet Metal, had come to Mr. Dojcinovic for work. Mr. Dojcinovic, according to Mr. Woods' testimony, gave Mr. Woods a few days' work hauling material in his truck, and told Mr. Woods he could use him on a regular basis once he started the Salvation Army job. It turned out that Mr. Dojcinovic had in fact bid that job too low, and considered pulling out, but Mr. Schaefflein persuaded him to stay in, and offered to help him stay within budget by supervising the job for him.

9. Mr. Woods worked on the Salvation Army job on a regular basis, and took most of his orders from Mr. Schaefflein (although some came as well from Mr. Dojcinovic when he was around). He testified that he did not think Mr. Dojcinovic was in a position to run the job himself, because he was "very busy looking after the residential end". Mr. Woods testified that he was and is of the view that Mr. Schaefflein was the real owner of Steve's Sheet Metal, and appears on occasion to have attempted to test his theory on Mr. Schaefflein while the two were working together. Mr. Schaefflein, however, would laugh and assure Mr. Woods that 'Steve's the boss'. At one point Mr. Woods heard another employee, Mr. Veys, approach Mr. Schaefflein in the shop and ask why Mr. Dojcinovic had telephoned him and told him not to come in to work. Mr. Schaefflein responded that he did not know. Mr. Veys then asked Mr. Schaefflein if it were true that there was going to be a lay-off. Mr. Schaefflein is said to have responded that that *was* true, but that Mr. Veys would not be affected. Mr. Schaefflein explained that that conversation would have referred to the fact that a lay-off was imminent for Toronto, but not for Hamilton.

10. Mr. Dojcinovic at the time already had a collective agreement with the *Toronto* Local of the Sheet Metal Workers' International Association, covering "i.c.i." work in the Metro area. At some point during the Salvation Army job, the employees of Steve's got together at a meeting to discuss unionization for their "i.c.i." work in Hamilton. Word of this got to Mr. Dojcinovic, and, as Mr. Dojcinovic candidly testified, he was so upset to learn of these secret deliberations that he fired all of his men on the spot. While Mr. Schaefflein was present at the time, Mr. Woods acknowledged in his testimony that it was Mr. Dojcinovic who stormed out of his office and said to the men: "You're trying to bankrupt me - you're all fired". The Union immediately filed a section 89 complaint with the Labour Relations Board, and discussions took place through the processes of the Board to attempt to settle the matter. The settlement sought by the Union was for Mr. Dojcinovic to sign a voluntary recognition agreement covering "i.c.i." work in Hamilton for Steve's Sheet Metal. Mr. Schaefflein was present to advise Mr. Dojcinovic, and the two apparently discussed with the Union how the proposed collective agreement for Hamilton would handle the matter of integrating Mr. Dojcinovic's existing workforce (including himself and his brother), with a unionized work force. Mr. Schaefflein advised Mr. Dojcinovic that he did not think that the terms discussed would unduly hamper Mr. Dojcinovic, and Mr. Dojcinovic decided to sign with the Union. That was in December of 1983.

11. Since that time, Mr. Dojcinovic had called upon the Union for men on an "i.c.i." job only once, and on a very minor scale only, up to the point (in April 1985) that the present



applications were filed. The applications were triggered by the discovery on an "i.c.i." job of an employee who said that he had been hired by Steve's Sheet Metal, but who had with him a purchase order in the name of G.S. Sheet Metal Company, about whom the employee indicated he had no knowledge.

12. The evidence before the Board shows that, since the time the collective agreement was signed by Mr. Dojcinovic, Mr. Schaefflein, through G.S. Sheet Metal, has successfully bid on a number of small jobs in the "i.c.i." sector in the area covered by the applicant's voluntary-recognition agreement with Steve's Sheet Metal. In the summer of 1984, Mr. Schaefflein moved his office out of his home and into a vacant office next door to the office of Steve's Sheet Metal. Both offices are part of a single industrial mall, but Mr. Schaefflein's office has its entrance (and address) on Barton Street, while Mr. Dojcinovic's is on Parkdale. All units in the mall are connected by an interior fire corridor, with the result that Mr. Schaefflein has ready internal access to Mr. Dojcinovic's office and shop. Mr. Schaefflein continues to spend a good deal of time in Mr. Dojcinovic's shop, "having coffee with the boys", as he put it, and continues to provide Mr. Dojcinovic with the bulk of his take-offs for "i.c.i." jobs. On at least four jobs, Mr. Schaefflein, to Mr. Dojcinovic's knowledge, has put in a bid of his own on jobs for which he supplied take-offs to Mr. Dojcinovic, and, because he is not covered by the Union's collective agreement, his final price has always been lower than Mr. Dojcinovic's. On two jobs at least, Tufford Nursing Home and Stoney Creek Hydro, Mr. Schaefflein successfully bid and began the job under G.S. Sheet Metal, but both jobs were completed by Steve's Sheet Metal under sub-contract when Mr. Schaefflein returned to Germany. We note that the Nursing Home job first came to the attention of the two men through Mr. Dojcinovic.

13. When Mr. Schaefflein went into his own office, he shared the use and expense of it with colleagues in the real-estate development business, but his real-estate colleagues have since pulled out. Mr. Schaefflein has a sign over his entrance saying "G.S. Sheet Metal Company", and conducts all of the business that he does on his own behalf under that name. Contrary to the perception of the Union's witnesses, we are satisfied that none of the office equipment now in Mr. Schaefflein's office (apart from a jointly-rented desk-top copier) came from Mr. Dojcinovic's office. A large number of the employees Mr. Schaefflein has hired for his installation work, on the other hand, *did* formerly work for Steve's Sheet Metal (one was terminated by Mr. Dojcinovic because of a drinking problem), but a number of these in fact had worked with Mr. Schaefflein and Mr. Dojcinovic in S & S Sheet Metal in the 1970's. At S & S Mr. Schaefflein had always hosted an "open" Christmas Party on December 22nd for people in the industry, and Mr. Schaefflein and Mr. Dojcinovic have carried on the tradition, using Mr. Dojcinovic's shop.

14. Mr. Schaefflein in fact has no shop, and has to contract out all of his fabrication work. The bulk of the custom-cut fabrication has gone to Steve's Sheet Metal, while the mass-produced items, as is normal in the industry, are purchased from larger suppliers. It is Mr. Schaefflein's evidence that he has stayed away from setting up a shop of his own this time around, as well as acquiring a large constant payroll, because he does not want either the headaches or the heart attack that have plagued him on the previous occasions that he was in business. Mr. Schaefflein knows that he can count on Mr. Dojcinovic's company, in particular, to supply him with additional manpower as required, and the evidence shows that, even on Mr. Schaefflein's own jobs, he has subcontracted at least part of the installation work to Mr. Dojcinovic on a regular basis. Mr. Dojcinovic's explanation for not having applied

his collective agreement to the performance of the work subbed from G.S. Sheet Metal is that there have been small jobs and he has performed them "non-Union" within the allowances granted by the Union at the time he signed the collective agreement. It might be added, finally, that Steve's Sheet Metal Company has, since the date of these applications, been successful in obtaining large "i.c.i." jobs in both the Hamilton and Toronto areas, and is staffing those jobs with members of the Hamilton and Toronto Locals, under the terms of the applicable collective agreements.

15. Does the above close and convenient working relationship between Mr. Schaefflein and Mr. Dojcinovic call for a finding and declaration under section 1(4) of the Act? The section provides:

"Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

The Board through a long series of cases has discussed the importance of this section, particularly in the construction industry, in preventing "double-breasting", or the siphoning off of what should be unionized work to a non-Union company. But here, as counsel for the applicant acknowledges, the situation is reversed: G.S. Sheet Metal, the non-union company, is engaging in the practice of subbing work that it obtains back to a unionized company (Steve's Sheet Metal). That does not, on its face, raise the kind of "mischief" that section 1(4) is designed to remedy. The collective agreement with Steve's Sheet Metal covers both shop and field work in the "i.c.i." sector, and if G.S. Sheet Metal chooses to have some or all of its work performed by employees of Steve's Sheet Metal, that would simply provide more work for the employees of Steve's Sheet Metal to perform under the terms of the applicant's collective agreement. Counsel argues, however, that the two principals are using the device of G.S. Sheet Metal to avoid having successful bids registered in the name of Steve's Sheet Metal, and thereby making detection by the Union impossible. This, counsel argues, is Mr. Schaefflein's way of trying to help Mr. Dojcinovic get around the collective agreement he helped Mr. Dojcinovic get into.

16. It is clear that the foundation for the Union's initial action in this case was the belief that Mr. Schaefflein and Mr. Dojcinovic were, at the very least, partners, and that Mr. Schaefflein had always held a position of ownership in Steve's Sheet Metal. As the following examination by Mr. Schaefflein of the applicant's business agent, Mr. Quin, at the hearing disclosed:

Q.: "Do you not know that Mr. Dojcinovic does not own a penny of G.S. Sheet Metal, and that I do not own a penny of Steve's Sheet Metal?"

A.: If I believed that, I wouldn't be here."

On all of the evidence, the Board does believe that. While the looseness of the financial arrangements between Mr. Schaefflein and Mr. Dojcinovic, and the amount of time and energy contributed by Mr. Schaefflein to Steve's Sheet Metal understandably raises the question, we are satisfied with the explanations offered by the two men that they have not, in fact, at any

time engaged in business on a partner-like or mutual ownership basis. Rather, we find that Mr. Dojcinovic has gone into business, and continued in business, on his own as Steve's Sheet Metal Company, and that Mr. Schaefflein was in business on his own as G.S. Sheet Metal Company in a period prior to 1983, and has continued in that manner from some time in 1983 onwards. While the looseness of the financial dealings between the two men is manifest, we do not find their protestation that each was in business on their own behalf unworthy of belief, in light of the history of mutual assistance between the two men. Given the free-spirited and somewhat erratic personality of Mr. Schaefflein in particular, we do not find the absence of a "strict accounting" between the two to be suspicious. Nor is there any evidence that any of the employees have been in doubt at any point in time as to which company was their employer. Even the employee on the job-site which triggered this application showed no uncertainty in that regard: he indicated that he was an employee of Steve's Sheet Metal Company, and the evidence shows that Steve's Sheet Metal Company was in fact performing subcontract work on the job. The employee's only uncertainty was as to the identity of "G.S. Sheet Metal Company", by whom he was *not* employed. In order to find that any business owned by Mr. Schaefflein was automatically covered by the collective agreement which Mr. Dojcinovic agreed to sign in settlement of the unfair labour practice complaint against him, the applicant would have to show more than what the evidence has disclosed to date.

17. The subbing of work back to Steve's Sheet Metal, however, has in it the seeds of "something more", on the basis of the avoidance of detection theory put forward by Mr. Simpson for the applicant. Were we satisfied that Mr. Simpson's theory of that action were correct, we might well come to the conclusion that the two businesses are being operated under a common form of direction, for purposes that fall readily within the kind of "mischief" meant to be protected against by section 1(4) of the Act. On all of the evidence, however, we are prepared to accept that the failure of Steve's Sheet Metal to hire men under the terms of the applicant's collective agreement for the work subbed to it by G.S. Sheet Metal is due to the position taken by Mr. Dojcinovic, acting on his own, that he has been operating within the allowances he feels were granted by the trade union at the time of entering into the voluntary agreement. Whether such allowances *do* exist under the collective agreement, and whether Mr. Dojcinovic has in fact stayed within those allowances on all work subbed by G.S. Sheet Metal to Steve's Sheet Metal to date, is a matter for examination in the portion of the section 124 application referable to Steve's Sheet Metal, which remains to be inquired into. Mr. Schaefflein, apart from returning regularly to Germany because of his own health and that of his father, testified that he needed very little work to make ends meet, and it would appear that the bulk of the actual work done to date on the contracts obtained by *either* company has been done by Steve's Sheet Metal. A careful accounting of the jobs flushed out by the section 1(4) application, therefore, is likely to deal in a substantial way with the concerns of the applicant for what has been done to date, as well as to clarify the question of what allowances exist for the future. Following such clarification, we would as well expect our comments in this decision to provide the applicant with protection against any possible temptation on the part of the respondents to use a company of Mr. Schaefflein's as a device around the collective agreement entered into by Mr. Dojcinovic.

18. On the basis of the foregoing, the section 63 and 1(4) applications against Gerhard Schaefflein and G.S. Sheet Metal Company are dismissed. As our comments indicate, however, it would be open to the Union to file a fresh application with the Board should future jobs indicate a deliberate attempt on the part of Mr. Dojcinovic and Mr. Schaefflein, acting in concert, to defeat the application of the collective agreement that Mr. Dojcinovic has entered into, and the facts set out in this decision, *supra*, will be a matter of record in that regard.



19. The section 124 application is remitted to the Registrar for continuation of hearing as it applies to S.N. Ventilation and Heating Limited, carrying on business as "Steve's Sheet Metal Company". Should the parties be unable to come to agreement on the allowances in hiring available to Mr. Dojcinovic under the terms of his agreement, together with the amount of damages payable, if any, for work performed heretofore by Steve's Sheet Metal on the jobs before the Board, these matters will be determined by the Board.

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**3273-84-U; 3274-84-OH** Communications, Electronic, Electrical Technical and Salaried Workers of Canada, Complainant, v. Super Plastics Corporation Limited, Respondent; Rasphal Kali Rai, Complainant, v. **Super Plastics Corporation Limited**, Respondent

**Discharge for Union Activity - Health and Safety - Interference in Trade Unions - Unfair Labour Practice - Allegation that union supporters laid-off, denied overtime or terminated contrary to *Occupational Health and Safety Act* - Employer not satisfying reverse onus - Violations found**

**BEFORE:** Judge R. S. Abella, Chairman, and Board Members I. Stamp and W. F. Rutherford.

**APPEARANCES:** Elizabeth J. Shilton Lennon, Sheila McIntyre and Jeff Smith for the applicant; and W. Thornton and W. Reszytniak for the respondent.

**DECISION OF THE BOARD;** December 20, 1985

1. These are complaints under section 89 of the *Labour Relations Act* and under section 24 of *The Occupational Health and Safety Act*. There are two complaints before the Board, one alleging that the respondent violated sections 64, 66 and 71 of the Act, with respect to Harpal Dhaliwal and Jarnail Singh, and one alleging violation of section 24 of *The Occupational Health and Safety Act* with respect to Rashpal Kali Rai. These proceedings were consolidated at the commencement of the hearing on consent of the parties.

2. The union filed an application for certification on February 19, 1985. Notice of this application was posted on February 22, 1985, with the terminal date fixed for February 28, 1985. A certificate was issued by the Board on March 8, 1985. (File No. 3083-84-R). The conduct about which the union complains took place between February 22 and March 8, 1985.

3. The union alleges that Harpal Dhaliwal was laid off, and that Jarnail Singh had his overtime reduced for union activity; and that Rashpal Kali Rai was terminated for union activity and in contravention of *The Occupational Health and Safety Act*.

4. Super Plastics manufactures garden hose and carpet runners. Its president is Walter Reszytniak, an employer who almost singlehandedly built up the company over 9 1/2 years and is actively involved in all aspects of the plant. He has a workforce of 88 employees, and the plant operates 24 hours daily with 3 shifts. Many of his workers are immigrants who have renewable work permits.

5. He learned of the union organizing campaign when the Form 6 arrived in the mail notifying him that an application for certification was before the Board.

6. Reszytniak was taken aback by the union campaign. In January 1985 he had held a meeting of employees to tell them what benefits, including a raise, OHIP and medical benefits he expected to be able to offer and was, as a result, both surprised and upset to learn that an application for certification was being brought. In his own words, he felt as if "someone hit me over the head with a hammer". He immediately sought legal advice and called a meeting of his plant manager, Frank Porto, his plant foremen Guillermo Pezzi, George Valdez, and Roshdi Soluman, and notified his shift supervisors. By his own admission he expressed his concerns about how the union would interfere with his ability to maintain flexibility and productivity. He wanted the employees to have "all the facts" before they decided on union representation, including the possible impact of unionization on his flexibility. He claimed in his evidence that although he wanted his employees informed, he did not specifically authorize any of his managerial staff to organize a petition against the union.

#### Harpal Dhaliwal

7. Harpal Dhaliwal was hired in October 1983 as a driver. He was on a work permit which was due to expire on March 5, 1985. His job was to pick up raw materials from other locations and to make deliveries of the finished products to local stores for consumer purchase. On average, he worked 55-60 hours per week and, until he was laid off on March 5, had never been off work at Super Plastics.

8. Dhaliwal, with Jarnail Singh and two other employees, was one of the key union organizers. On the weekend of February 16, these 4 employees visited other employees in their homes and obtained signatures on union membership cards. The application for certification was sent to the Board on Monday, February 18th.

9. At the end of his shift late in the afternoon of February 22nd, Dhaliwal went to see Reszytniak, as he usually did, to see if there was any other work to be done that day. During this brief conversation, Dhaliwal stated that Reszytniak asked him if he knew who had been responsible for the union organizing. Dhaliwal claimed not to know because, he said, he knew Reszytniak would not be in favour of the union and feared reprisals against employees who had joined. According to Dhaliwal, Reszytniak then told him that a union was no good, was harmful to companies, and that he did not want a union at Super Plastics.

10. On Monday, February 25, Reszytniak drove Dhaliwal to the garage to pick up his truck and asked him if he attended a meeting of the employees interested in the union over the weekend. When Dhaliwal said that he had been in Montreal and had missed the meeting, Reszytniak asked him if he had heard what had happened at the meeting. Dhaliwal replied that he was not very interested in unions.

11. On February 25th, in Dhaliwal's presence, Mike Kostick, a foreman, asked another

employee, Wilfred McCalla, to sign an anti-union petition. McCalla refused, and Kostick asked Dhaliwal what he thought about the union. When Dhaliwal said he thought it was necessary, Kostick advised him that he had already collected 25 names for the petition and had been given the week off by Reszytniak to collect signatures for the petition.

12. The next day, Tuesday, February 26, as Dhaliwal and Jarnail Singh were cleaning up beside the main office at the end of their afternoon shift, Reszytniak approached both of them, put his hands on their shoulders and confided that these two employees were his friends and like younger brothers to him. He urged them not to go against him and to speak to the other employees with whom he could not as easily converse because of language barriers, about how damaging a union could be. He told them that without a union, he could provide benefits and keep them busy all year round and asked them to "think it over".

13. On Wednesday morning, Dhaliwal went to the main office to discuss a work-related matter with Reszytniak. During this conversation Reszytniak reminded him that many of the employees were on work permits giving them permission only to work at Super Plastics. He asked Dhaliwal if he wanted to see those people unemployed. Dhaliwal replied that he did not, reminded Reszytniak that his own work permit expired on March 5, and asked if that meant he would not be getting a job letter to renew his permit. Reszytniak said he would have to think about it because there were so many changes to be made.

14. Dhaliwal then went to see the office secretary from whom job letters were, customarily, automatically given. He was told to come back later after she had had a chance to speak to Reszytniak. When he came back 3 hours later, the secretary told him Reszytniak wanted to speak to him before he got the letter. At the end of the day, he went to see Reszytniak who told him he did not know if he could give a letter because he did not know if there would be enough work. They then had a two hour conversation during which Reszytniak showed Dhaliwal a number of documents, including job evaluations and papers outlining proposed organizational and personnel changes, explained his concern that unionization would interfere with the ability to implement those changes, advised him that he might hire outside contractors to do Dhaliwal's work, suggested that since it was a seasonal business the plant might for the first time be closed summers with attendant layoffs if a union came into the plant, and urged Dhaliwal to call a meeting that day to speak to the employees about changing their minds and signing a petition against the union. Dhaliwal was told that they would discuss his job letter after he had tried to talk to the employees as Reszytniak had requested.

15. After this meeting, Dhaliwal talked to Jarnail Singh and they agreed to proceed with the certification application notwithstanding Reszytniak's suggestion. The next morning, Thursday, February 28, as Dhaliwal arrived at work at 7:30 a.m., he was approached by Reszytniak in the presence of George Valdez, a foreman and asked what had happened. When Dhaliwal said that the employees still wanted a union, Reszytniak told Dhaliwal that he had heard the contrary, and that his information was that only Dhaliwal and Jarnail Singh wanted the union.

16. On Friday, March 1, Dhaliwal requested the job letter twice from Reszytniak and was told the letter would be ready Monday. On Monday, March 4, Reszytniak was not at work, could not be reached at home, and had not left instructions for a letter to be prepared. One of the foremen, Frank Porto, suggested to Dhaliwal that he go to immigration the next



day and have them call the office to confirm his employment status. At the immigration office the next day, the immigration officer phoned Super Plastics and as a result of what she was told, advised Dhaliwal that she could not issue a work permit to him. He personally called his employer and was told that Reszytniak was not there and that Porto was unavailable.

17. The next day, unable to work at Super Plastics without a permit, he applied for and was hired by another company as a driver. With this job letter, he returned to immigration where he was able to obtain an "open permit" which permitted him to work anywhere. On Wednesday, March 7, he returned to Super Plastics, advised Reszytniak that he had an open permit and could work for him. He was told that the truck he had been driving was too expensive to repair and that contracts would henceforth be made with cartage companies to perform Dhaliwal's work. Reszytniak told him he had the option of working for 10 to 15 hours weekly or being laid off. Dhaliwal was laid off when he said he could not work only 10 or 15 hours per week.

18. Reszytniak admits talking to Dhaliwal about the union, admits that he confided his displeasure about the union to him, and acknowledges telling him that he hoped the employees "did the right thing". He stated that he had spent \$6,000 during 1984 on repairs for the truck driven by Dhaliwal and that it made more economic sense to hire cartage companies who had their own drivers than to continue to repair the truck driven by Dhaliwal.

#### Jarnail Singh

19. Jarnail Singh has been employed at Super Plastics since 1982 as a mechanic's helper on the day shift. He is on a work permit and is presently an applicant for refugee status. He is the assistant to the mechanic, Mike Kostick. Singh acknowledges that he and Harpal Dhaliwal were the key union organizers at Super Plastics and that he was responsible with Dhaliwal for getting other employees to sign union cards.

20. On Friday, February 22nd, when the Form 6 was posted at the plant, he was asked by Mike Kostick whether he knew about the union. Singh said that he did not want to participate in this activity. Kostick then went into Reszytniak's office eight or nine feet away and after an hour came out and said to Singh that the union was not good for the plant and that they did not want the union at Super Plastics. He also reminded him that he worked on a work permit and that Reszytniak issued the job letters. Singh replied that he had already signed for the union and that he believed that the union was better for the employees and would never go against the union. Reszytniak then came out of his office and said to Singh that he had no more overtime or any weekend work for Singh.

21. Singh used to work an average of 15 hours per week overtime. During the two week period ending February 9th, 1985, he had worked 38 hours overtime; during the two week period prior to February 23rd, 1985, he worked 20 hours overtime. After February 22nd, 1985, he was given no more overtime.

22. On Monday, February 25th, 1985, Singh was working alone in the machine shop early in the morning when Reszytniak approached him and asked if he knew anything about the union and who had organized it. When Singh said that he did not know who was responsible Reszytniak explained to him that the union was no good, that Singh would have

to pay the union monthly dues, and that Reszytniak's plans for the operation of Super Plastics would be incapable of implementation if the union were certified. Singh replied that he signed for the union and that he had not changed his mind about joining the union.

23. On February 26th, 1985, he and Dhaliwal were approached by Reszytniak who requested that they phone people and get them to sign a petition against the union. Singh never had any further conversations with Reszytniak about the union.

#### Rashpal Kali Rai

24. Rashpal Kali Rai has been at Super Plastics since February 1980. He is a landed immigrant. He was first hired as a material handler and then in 1981 was assigned to the compounding machine. After one month working on this machine, he got sick. He was taken home from work by his brother and went to his doctor the same morning. He was away from work for one week and reported the accident to the Worker's Compensation Board. He obtained a letter from his doctor indicating that he was allergic to the fumes.

25. When Kali Rai returned to work, he showed his foreman, Pezzi, the doctor's letter. He was advised by Pezzi that if he took Worker's Compensation he would be fired. As a result, Kali Rai did not send anything further to Workers' Compensation. He did, however, advise Pezzi that he was allergic to the compounding machine and as a result Reszytniak told Kali Rai that he would no longer have to work at the compounding machine. He was then assigned to the knitting machine where he worked until June of 1984.

26. To the best of Kali Rai's knowledge there were no other accidents with respect to the compounding machine except one incident in 1983 when it was his understanding that an employee named Ajit Dewal was sick for one month as a result of working on the compounding machine.

27. In June of 1984, at his own request and with the consent of Reszytniak, Kali Rai was off work for several months to enable a friend of his to work at his job for a period of five months. When he returned in November of 1984, he worked on the tow motor and assisted on the needle machine.

28. Between 1981 and 1984 he occasionally worked on the compounding machine but only for periods of ten or fifteen minutes while other workers were on breaks.

29. On January 7th, 1985, there was an accident at Super Plastics resulting from fumes. Five employees were taken to the hospital as a result of this accident and an Occupational Health and Safety Inspector was called. The plant was closed for one and a half shifts until the inspection had been completed and the problem rectified. During the inspection, the compounding machine was not in operation and, as a result, there is no reference to it on the report of the Occupational Health and Safety Inspector. It was Kali Rai's observation that the accident was caused by the compounding machine, but the Company's position is that it was in fact caused by the tow motor which was repaired. Kali Rai was not injured in the accident of January 7th, 1985.

30. Shortly after the accident, Kali Rai was advised by Porto that he had to come to

the office and was told that he was a member of the Occupational Health and Safety Committee. This Committee had no meetings but he was told to sign some papers.

31. Kali Rai never saw any of the reports of the Safety Inspector, nor did any of the other employees called to give evidence by the union. None of the employer's witnesses could recall whether or not the reports were posted and the employees were never notified officially as to the cause of the accident.

32. On Monday, February 25th, 1985, Kali Rai was approached by Kostick as he started his morning shift. Kostick asked him if he knew about the union and Kali Rai said that he did. Kostick asked him if he had signed a union card and Kali Rai replied that he had.

33. On Tuesday, February 26th, 1985, he was informed by Pezzi as he started his morning shift that he had to work on the compounding machine. When Kali Rai reminded him that he had gotten sick in 1981 from working on the compounding machine, Pezzi did not respond. Kali Rai told him that he works only on the tow motor and knitting machines and did not want to work on the machine that had made him ill. Pezzi simply responded that he was obliged to work on the compounding machine and when Kali Rai asked him why they weren't using the regular worker on that machine, he was told by Pezzi that she had to do other work that day. Pezzi and Kali Rai got into an argument during which Pezzi advised him that if he refused to work on the compounding machine, he would be terminated. As 10:00 that morning he came to talk to Reszytniak and requested his job back. Reszytniak's secretary advised him that Reszytniak did not have time to talk to him and he was given a separation slip indicating that he had quit. When he attempted to argue with the secretary that he was fired rather than quit, she simply handed back his separation slip to him. He was not able to speak to either Reszytniak or any foreman about the reasons for his termination. It was Kali Rai's perception that he was fired because of union membership and that Reszytniak was responsible for the firing because all such decisions in the plant were made by Reszytniak.

#### Zorawar Singh

34. Zorawar Singh has been at Super Plastics since February 1981 as a general labourer. He became a knitting machine operator six months later and was continued on that job. He is on a work permit. He knew from Jarnail Singh that there was a union being organized and he signed a union card. He was a night shift worker.

35. On Friday, February 22nd, and almost every day the following week, he had conversations with George Valdez, a foreman. Valdez explained to him that since he was the senior worker on the night shift, his influence was strong with the other employees. Valdez asked him to sign a petition so that everyone on the night shift would sign. He was told that if there was no union he would get more overtime work and a raise. Zorawar Singh refused to sign the petition, and advised Valdez that the union organizers were his friends and he refused to go against them.

36. On Monday, February 25th, he arrived at work close to midnight and encountered Valdez. Valdez advised him to go next door to the machine shop because someone wanted to talk to him. He and the seven employees he arrived at work with went to the machine



shop where Kostick and Piara Singh were conducting a meeting. Piara Singh asked the workers to sign the petition but was told by the workers that they were not interested in talking to him about it and went back to the plant. Sometime later that night Valdez approached Zorawar Singh and asked him to go to the main office with him. In the office, Valdez, Kostick and Piara Singh were present and asked him to sign a petition. He advised them that he had already indicated that he refused to sign and asked them not to bother him anymore. He went back to work and observed that four or five other night shift employees were called into the office one at a time.

37. Zorawar Singh's work permit was due to expire on February 28th, 1985. When he asked Pezzi, his foreman for a letter, Pezzi said he would talk to the secretary about it. It is Kali Rai's evidence that he was given a letter from the secretary regarding Zorawar Singh's work permit before February 26th, but that it was taken away from him by Valdez. When Zorawar Singh reminded Valdez that he had been told by Kali Rai that Valdez had his job letter, Valdez told him that Reszytniak had said that he would have to get the letter from the office. Zorawar Singh refused to go to the office because he thought that if he went, Reszytniak would make him sign a petition.

38. As a result of the exchange with Valdez, he called the immigration office and was informed that he no longer needed a job letter if he was still working at Super Plastics.

39. On February 27th, 1985, Reszytniak advised Zorawar Singh that he would not give him a job letter because there was no more work for him. He accused him of being misguided by the union organizers and of following them blindly. Reszytniak, according to Zorawar Singh, was very angry during this conversation.

40. On February 28, 1985, he went to the Immigration Office and got a work permit notwithstanding the absence of a job letter. On Saturday morning he was called into Reszytniak's office and was advised by him that there was no more work for him. When he told Reszytniak that he had a work permit anyway, Reszytniak advised him that it made no difference whether he had a work permit, that as the owner of the company it was his decision as to who his employees were, and advised him to attend at the office for a separation slip. That morning he did attend at the office and obtained his separation slip which shows the reason for the lay-off as being "shortage of work".

41. Two weeks later he was recalled to work and the union has accordingly abandoned its application with respect to Zorawar Singh. It was Zorawar Singh's feeling that he was being laid off because of his union activities, since out of the six men working on knitting machines, only one had more seniority than he, yet he was the only one laid-off.

42. On the basis of all the evidence, it is clear that Reszytniak objected to the union being organized at Super Plastics. The issue before the Board is whether his conduct went beyond the parameters of an employer's right to express his or her opinion about the existence of a union. After observing the demeanour of the witnesses and hearing their evidence, where there was conflict, the Board found the evidence of the complainant more credible than that of the respondent.

43. Most of Reszytniak's work force were on work permits. There is no doubt from the evidence that Reszytniak and his foremen knew who the key union organizers were, and

that they were unhappy about their refusal to cooperate in Reszytniak's wish that the organizing campaign be stopped. Although several of the employees at Super Plastics had work permits which were due to expire around the time of the organizing campaign, the only people whose work or terms of employment were affected, were those Reszytniak and his foreman were able to identify as being key union supporters. Knowing the fragility of the work permit situation and the determinative role Reszytniak played in the renewal of such permits, pressure was applied on these employees to attempt to dissuade them from union membership on threat of losing their jobs or overtime. It must be concluded that it was no mere coincidence that Harpal Dhaliwal, Jarnail Singh, and Rashpal Kali Rai were dealt with in the way that they were. Given the timing of their termination, lay-off, and the refusal to permit overtime work, there can be no conclusion other than that this conduct was motivated by an anti-union animus on the part of the employer. Nor can there be any doubt that Reszytniak was fully aware of the conduct of his foremen in attempting to stop the union and that he condoned their activities.

44. Although there was undoubtedly a problem with the truck driven by Harpal Dhaliwal which resulted in expenses to Super Plastics, there was no evidence from the employer to show that the use of cartage companies to replace Dhaliwal was in fact a cost saver. On several occasions in the previous year, the truck had broken down and Dhaliwal was used to other capacities by Super Plastics. In addition, there had been conversations between Reszytniak and Dhaliwal in which proposals were made to purchase another truck for him. When an employer attempts to rely on the defence of shortage of work to justify conduct which can otherwise be tainted by the possibility of anti-union animus there is a burden on the employer to show that the conduct is more consistent with the economic factors than it is with the anti-union animus. In this case, we are satisfied that the economic factors were not the main reason for Dhaliwal's lay-off, but that the pattern of the employer's conduct during this two week period indicated it was more consistent with the wish to prevent the union from being certified and to punish those who were responsible for its introduction at Super Plastics.

45. Similarly, this pattern of conduct, including the organization of a petition with several days off work being given to plant foremen to organize the anti-union campaign, points to an anti-union animus in the suspension of overtime work for Jarnail Singh. Although there is no question that overtime was substantially reduced for all employees for a two month period at Super Plastics, nonetheless Jarnail Singh was the only one who was offered no overtime notwithstanding the fact that he had been an employee who had worked more overtime than most at the plant.

46. It is not clear from the evidence whether the accident on January 7th at Super Plastics which resulted in the intervention of the Occupational Health and Safety Inspector was caused by the compounding machine. Nonetheless, it was Kali Rai's perception that the compounding machine was in fact responsible. Moreover, he had himself been injured by this machine in 1981 and as a result had not been required to do a full shift on this machine since then. He reasonably assumed that the compounding machine was damaging to his health, and was therefore entitled to refuse to work at this machine. The employer, knowing of his previous accident, was not entitled to insist that he undertake work which he knew was potentially damaging to Kali Rai's health. It is clear from the evidence that there was no Occupational Health and Safety Committee at the plant which was in any way functional and that employees were not advised of their rights under the Act. Nor were any measures formally taken by any Committee at the plant to ensure the implementation of the *Occupational Health and Safety Act*. Having identified Kali Rai as one of the union supporters, and

notwithstanding that the company had accommodated his health concerns by alleviating him of the responsibility of working at the compounding machine since his accident in 1981, there can be no other conclusion but that the company was attempting to punish him for his union membership in violation both of the *Labour Relations Act* and of the *Occupational Health and Safety Act*.

47. The parties had indicated at the commencement of the hearing that should the Board find a violation of the Act, they wished the opportunity to make representations to the Board as to remedies and damages. This panel will therefore remain seized of this case to permit the parties to make their submissions if they are unable to agree.

48. The Board having concluded on the basis of all the evidence and the relevant case law cited by counsel, that the employer did not discharge his onus under section 89 to satisfy the Board that the allegations were due to other than an anti-union animus, the Board hereby finds that Super Plastics Corporation Limited has contravened sections 64 and 66 of the *Labour Relations Act* as well as section 64 of *The Occupational Health and Safety Act*.

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**1257-85-R** B. Harrison, Applicant, v. Ontario Public Service Employees Union, Respondent, **Children's Aid Society of the Regional Municipality of Waterloo**, Intervener

**Practice and Procedure - Representation Vote - Termination - Termination application unsuccessful after tie in vote - Employee claiming mistake in marking ballot and seeking setting aside of vote result - Board not going behind expression on ballot to inquire into voter's subjective state of mind**

**BEFORE:** Owen V. Gray, Vice-Chairman, and Board Members R. J. Gallivan and K. V. Rogers.

**APPEARANCES:** Moira Robertson, Betty Harrison and Barbara VanNorman for the applicant; R. Ross Wells for the respondent; Andrea Esson and Peter Ringrose for the intervener.

**DECISION OF THE BOARD;** December 10, 1985

1. This is an application to terminate the respondent's union bargaining rights. In a decision dated October 9, 1985, a differently constituted panel of the Board directed that a representation vote be conducted to determine whether a majority of the employees in the bargaining unit represented by the respondent wished its bargaining rights terminated. That representation vote was conducted on October 21, 1985. Sixteen ballots were cast; eight were marked in favour of the respondent and eight against. One of the voters now asks that the results be set aside and a new vote directed, because she made a mistake in marking her ballot. The relevant facts are not in dispute.

2. Before the representation vote was conducted, a notice to employees in Form 69



was posted on the employer's premises. That notice described the arrangements for the conduct of the vote and displayed a sample of the form of ballot which would be given to voters. The question on the ballot was:

In your employment relations with Children's Aid Society of The Regional Municipality of Waterloo do you wish to be represented by Ontario Public Service Employees Union?

Voters were offered the options "Yes" and "No". Beside each of those two words is a circle; a voter need only place a mark in one or other of the circles to signify his or her choice.

3. Moira Robertson, an employee in the bargaining unit, attended to vote. She marked her ballot, submitted it to the Returning Officer and left the polling area. Within a matter of minutes, without having spoken to anyone or reviewed any document, Ms. Robertson realized that the question on the ballot she had just read and marked was not "do you wish to terminate the bargaining rights of ..." but "do you wish to be represented by ...". She had marked her ballot "yes". She realized that was the wrong answer to the question asked, since what she wanted was that the respondent's bargaining rights be terminated. She returned to the polling area immediately. She told the Returning Officer and scrutineers that she had made a mistake. They informed her that her ballot had already been placed in the ballot box and that all she could now do was raise the issue in a letter to the Board. She did, and the matter was listed for hearing.

4. Although aware that the Board's Notice of Taking of Vote in Form 69 had been posted, Ms. Robertson had not examined that notice before attending to vote. She did not seriously contend that the form of ballot was misleading. Indeed, it was clear enough that she both remembered and correctly understood it within minutes after leaving the polling area and without any further examination or consultation. As she put it, she had "misread the question for that split second and ticked the wrong box." She blames no one but herself for the mistake, but feels others opposed to the union should not "suffer" for her mistake.

5. When the conditions described in subsection 57(3) of the Act are satisfied, the outcome of an application under section 57 to terminate the bargaining rights of a trade union is determined by the percentage of ballots cast in a representation vote which are cast in opposition to the trade union, in accordance with subsection 57(4). The balloting is conducted in secret, so as to best ensure the free expression of the wishes of those voting. The value of this process would be totally undermined if it were open to any party to have the Board inquire into the subjective state of mind of any voter at the time of his or her vote.

6. In *RSLs Inc.*, [1982] OLRB Rep. June 921 dealt with a termination application in which there was an argument about the effect to be given to a ballot which had been "spoiled" with an indication that was neither a "yes" or "no" answer to the question posed. An employee's affidavit had been placed before the Board, and it appears the Board was invited to take the allegations in the affidavit into account in determining the effect to be given to the spoiled ballot. In that context, the Board made these observations:

3. ...The Board must determine the freely expressed wishes of the employees and there should be no encroachment upon the secrecy of the balloting. Anything other than a simple answer to the question posed, carries with it the potential for revealing employee wishes which the whole process is designed to keep secret. The Board cannot embark upon an inquiry into "what the employee really meant" without undermining the very secrecy which the voting process purports to guarantee. (See Form 69).

6. The Board has no inclination whatsoever to inquire into what the objecting employee "really meant" by his abstention - especially since neither the applicant nor respondent has raised any complaint about the conduct of the balloting. To undertake such inquiry would not only prejudice the secrecy of the representation vote but would also open the door to an inquiry whenever an employee seeks to explain the motivation behind his spoiled ballot. We see no reason to undertake such inquiry given the explicit instructions given to all employees and the clear and obvious choice open to them when they cast their ballot...

The representation vote in this case was properly conducted. The only alleged error was that of an individual voter. We feel the remarks of the Board in *RSLS Inc.*, *supra*, are equally applicable here. To them we would add the observation that if a vote could be set aside as a result of one voter's confessing that he or she misunderstood a question which is unambiguous on its face, then the Board would be obliged to consider an allegation by one voter that *other* voters misunderstood the question and voted "wrong". It is a short step from that invasion of privacy of the polling booth to an inquiry into the quality of thought devoted to the response of a voter to a question he or she did understand. An employee's entitlement to have her vote count does not and should not depend on her satisfying the Board that she knew what she was doing or made the "right choice". The voter's right to unquestioned acceptance of the choice she expresses carries with it responsibility for the choice expressed and its consequences. We are not prepared to give the ballots cast in the vote of October 21, 1985, any significance other than the significance they have on their face. We so ruled orally at the hearing of this matter on November 22, 1985. We hereby confirm that ruling.

7. Notice of the report of the Returning Officer was given in a timely fashion to the applicant, respondent and intervener. The intervener employer acknowledges receipt of the standard letter from the Board requiring that it post a copy of the notice addressed to employees and that it complete and return a Return of Posting card to indicate the date on which posting was effected. That card was not returned to the Board, and no one present at the Board's hearing of November 22, 1985 could confirm that the notice to employees of the Returning Officer's report had ever been posted. Accordingly, we direct that:

- (a) the Returning Officer shall prepare a fresh notice of his report of the vote conducted October 21, 1985, with a revised deadline for submissions calculated in accordance with the Board's Rules of Practice;
  - (b) The Registrar shall forward that fresh notice and a Return of Posting card to the intervener employer under cover of a letter containing the usual instructions, which letter shall be copied to the applicant and respondent; and,
  - (c) the intervener employer is hereby directed to post the notice of report of the Returning Officer and complete and return the Return of Posting card forthwith after receipt.
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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1985

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**2922-84-R:**United Food and Commercial Workers International Union, Local 175, (Applicant) v. S. Gumpert Co. of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except plant supervisor, persons above the rank of plant supervisor, office and sales staff, and technical employees." (11 employees in unit). (*Clarity Note*).

**0437-85-R:**United Steelworkers of America, (Applicant) v. Antique Building Supplies Ltd. c.o.b. as Toronto Fabricating Co., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (17 employees in unit). (*Clarity Note*).

**0455-85-R:**United Steelworkers of America, (Applicant) v. Laidlaw Wire of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

**0635-85-R:**Labourers' International Union of North America Local 527, (Applicant) v. Geo. Robson Construction Weston Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0680-85-R:**Graphic Communications International Union, Local 500M, (Applicant) v. Ellis Packaging Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, management trainee, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (39 employees in unit). (*Having regard to the agreement of the parties*).

**0758-85-R:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC), (Applicant) v. 574037 Ontario Ltd. (c.o.b. O'Tooles Road House Restaurant), (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Newmarket, Ontario, save and except supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

**1012-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Rowad Pipeline Company Ltd., (Respondent).

Unit: "all employees of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1066-85-R:** Teamsters Union Local No. 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. General Metal Products of Windsor Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons who regularly work not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

**1487-85-R:** The Sheet Metal Workers' International Association Local Union 562, (Applicant) v. Reitzel Heating and Sheet Metal Ltd., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees in unit).

**1524-85-R:** Canadian Union of Public Employees, (Applicant) v. Ilott Enterprises Inc., (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of York, save and except directors and persons above such rank." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1525-85-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Town-Wood Homes Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).



Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1526-85-R:**United Steelworkers of America, (Applicant) v. Rembrandt Jewelry Manufacturing Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (91 employees in unit). (*Having regard to the agreement of the parties*).

**1532-85-R:**Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Sarsan Holdings Limited, (Respondent).

Unit #1: "all office and clerical employees of the respondent in Whitby, save and except supervisors, those above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**1562-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Mellows (Stoney Creek) Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders employed by the respondent in the City of Sault Ste. Marie, save and except assistant hostesses, persons above the rank of assistant hostess, persons employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

**1570-85-R:**The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, (Applicant) v. Centrestage Toronto, (Respondent).

Unit: "all stage employees of the respondent at 9 Hanna Avenue in Metropolitan Toronto." (5 employees in unit).

**1574-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Bruno's Contracting (Thunder Bay) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at 665 Hewitson Street, in the City of Thunder Bay, in the District of Thunder Bay save and except foremen, persons above the rank of foreman, engineering, sales, office and clerical staff and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1594-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Bruno's Contracting (Thunder Bay) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all kitchen and bunk house cleaning staff of the respondent employed in the Township of Lahontan in the District of Thunder Bay save and except supervisors and persons above the rank of supervisor." (3 employees in unit). (*Having regard to the agreement of the parties*).

**1596-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Bruno's Contracting (Thunder Bay) Limited, (Respondent).

Unit: "all employees of the respondent at Belrose Gravel Pit in the City of Thunder Bay, in the District of Thunder Bay save and except foremen and persons above the rank of foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1609-85-R:** The Canadian Union of Public Employees, (Applicant) v. The Association for the Developmentally Handicapped of Oshawa and District (ADHOD Services), (Respondent).

Unit: "all employees of the respondent in Oshawa, save and except supervisors, persons above the rank of supervisor, residential services office and clerical, and sales personnel." (49 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1620-85-R:** Canadian Union of Public Employees, (Applicant) v. Hillside Nursing Home Limited, (Respondent).

Unit #1: "all employees of the respondent in the Township Ellice, save and except director, persons above the rank of director, clerical staff, registered and graduate nurses, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (34 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

**1634-85-R:** Service Employees International Union Local 268, (Applicant) v. The Lakehead District Roman Catholic Separate School Board, (Respondent).

Unit: "all employees of the respondent in the District of Thunder Bay employed in maintenance services, custodial services and plant operations for not more than twenty (20) hours per week, averaged over a seven (7) week period and students employed during the school vacation period, save and except supervisors, foremen, persons above the rank of supervisor and foreman, teaching staff and office and clerical staff and the collective agreement covering the respondent's "full-time" employees." (22 employees in unit). (*Having regard to the agreement of the parties*).

**1651-85-R:** The Canadian Union of Public Employees, (Applicant) v. Rushnell Ambulance Service, (Respondent).

Unit: "all employees of the respondent in Trenton regularly employed for not more than twenty-four (24) hours per week, save and except supervisor and persons above the rank of supervisor." (7 employees in unit). (*Having regard to the agreement of the parties*).

**1653-85-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Mega Concrete Forms Ltd., (Respondent) v. L.I.U.N.A. Local 527, (Intervener).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of foreman." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**1691-85-R:**Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261, (Applicant) v. Service Star Building Cleaning Inc., (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent employed in the City of Cornwall, save and except manager and persons above the rank of manager.” (49 employees in unit).

**1698-85-R:**Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. The Pastry Place Limited, (Respondent).

Unit:“all employees of the respondent in Windsor, save and except supervisor, persons above the rank of supervisor, office and clerical and sales staff.” (6 employees in unit). (*Having regard to the agreement of the parties*).

**1704-85-R:**Canadian Union of Public Employees, (Applicant) v. Medical Pharmacy (Oshawa) Limited, (Respondent).

Unit:“all employees of the respondent in Oshawa, save and except manager, pharmacists, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*).

**1722-85-R:**London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Rest Haven Nursing Home, (Respondent).

Unit #1:“all registered nurses employed in a nursing capacity by the Respondent in St. Thomas save and except Director of Care, and Food Services Supervisor and persons above the rank of Director of Care and Food Services Supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and employees in bargaining units for which any trade union held bargaining rights as of October 9, 1985.” (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2:“all registered nurses employed in a nursing capacity for not more than twenty-four (24) hours per week by the Respondent in St. Thomas save and except Director of Care and Food Services Supervisor and persons above the rank of Director of Care and Food Services Supervisor, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of October 9, 1985.” (4 employees in unit). (*Having regard to the agreement of the parties*).

**1726-85-R:**Toronto Typographical Union, Local 91, (Applicant) v. Fitzhenry & Whiteside Limited, (Respondent) v. Group of Employees, (Objectors.)

Unit:“all warehouse employees of the respondent in the Town of Markham, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (33 employees in unit).

**1739-85-R:**Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Moulure Alexandria Moulding owned and operated by Alexandria Sash and Door Co. Limited, (Respondent).

Unit:“all employees of the respondent in Lochiel, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office, clerical and sales staff and persons regularly employed for not more than twenty-four (24) hours per week.” (6 employees in unit). (*Having regard to the agreement of the parties*).



**1741-85-R:**Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Geraldton, (Respondent).

Unit: "all employees of the respondent at Geraldton save and except supervisors or foremen, persons above the rank of supervisor or foreman, persons regularly employed for not more than (24) twenty-four hours per week, and students employed during the school vacation period." (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1743-85-R:**Sheet Metal Workers' International Association Local Union 540, (Applicant) v. Plasticair Inc., (Respondent).

Unit: "all employees of the respondent in its Plasticair Manufacturing Division in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

**1760-85-R:**Canadian Paperworkers Union, (Applicant) v. W. H. Smith Ltd., (Respondent).

Unit: "all employees of the respondent at its warehouse at 3808 Victoria Park Avenue in the Municipality of Metropolitan Toronto, save and except foremen and head shipper, persons regularly employed for not more than twenty-four (24) hours per week, students employed in the school vacation period, students employed on a co-operative program with a school, college or university, and office and sales staff." (24 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1767-85-R:**Labourers' International Union of North America, Local 1089, (Applicant) v. Mills Construction, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1770-85-R:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Federal White Cement Company Ltd., (Respondent).

Unit: "all employees of the respondent at its plant at Paris, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1774-85-R:**International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 834, (Applicant) v. Beaver Equipment Mfg. (1971) Co. Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, draftsmen, and persons engaged in field erection work." (13 employees in unit). (*Having regard to the agreement of the parties*).

**1796-85-R:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicants) v. Brick Brewing Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Waterloo save and except supervisors, persons above the rank of supervisor, office and sales staff, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Waterloo regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

**1808-85-R:** Canadian Union of Public Employees, (Applicant) v. London & Middlesex County Roman Catholic Separate School Board, (Respondent).

Unit: "all employees of the respondent in the City of London and County of Middlesex engaged in food services, save and except supervisors, those above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of October 10, 1985." (10 employees in unit). (*Having regard to the agreement of the parties*).

**1818-85-R:** Canadian Union of Restaurant and Related Employees Hotel Employees Union Local 88, (Applicant) v. 605452 Ontario Limited carrying on business as O'Tooles Roadhouse Restaurant, (Respondent).

Unit: "all employees of the respondent at 4505 Sheppard Avenue, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

**1837-85-R:** Ontario Nurses' Association, (Applicant) v. Victorian Order of Nurses, Sudbury Branch, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Sudbury, Ontario, save and except senior nurse and those above the rank of senior nurse and persons employed for not more than twenty-four hours per week." (13 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity for not more than twenty-four hours per week by the respondent in Sudbury, Ontario, save and except senior nurse and those above the rank of senior nurse." (14 employees in unit). (*Having regard to the agreement of the parties*).

**1850-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. J. McLaughlin Excavating and Grading, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**1867-85-R:** Graphic Communications International Union, Local 500M, (Applicant) v. Toronto Carton Company Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four

(24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of October 24, 1985.” (130 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1892-85-R:**Ontario Public Service Employees Union, (Applicant) v. Huntsville District Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: “all paramedical employees of the respondent at Huntsville and Burk’s Falls, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (15 employees in unit). (*Clarity Note*).

**1905-85-R:**Service Employees’ Union, Local 210, affiliated with Service Employees’ International Union, AFL-CIO-CLC, (Applicant) v. Sydenham District Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #2: “all office and clerical employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period in Wallaceburg, Ontario, save and except department heads and supervisors, persons above the rank of department head and supervisor and assistant to the administrator.” (6 employees in unit). (*Having regard to the agreement of the parties*).

**1919-85-R:**The West Lincoln Ambulance Employees’ Association, (Applicant) v. West Lincoln Ambulance Service, (Respondent).

Unit: “all employees of the respondent at Grimsby, Ontario, save and except assistant managers, and those above the rank of assistant manager.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**1942-85-R:**Canadian Paperworkers Union, (Applicant) v. W. H. Smith Ltd., (Respondent).

Unit #1: “all office and clerical employees of the respondent at its head office in Metropolitan Toronto regularly employed for not more than 24 (twenty-four) hours per week, save and except supervisors, persons above the rank of supervisor, buyers, sales staff, secretary to the president, secretary to the vice-president finance, secretary to the vice-president planning and development, secretary to the vice-president marketing, secretary to the vice-president retail, secretary to the vice-president and corporate secretary, programmer, and display and promotions co-ordinator.” (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at its warehouse at 3808 Victoria Park Avenue, in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 (twenty-four) hours per week, save and except foremen and head shipper, persons above the rank of foreman and head shipper, office and sales staff.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**1954-85-R:**Canadian Union of Public Employees, (Applicant) v. The Municipal Corporation of the Town of Campbellford, (Respondent).

Unit #1: “all employees of the respondent in Campbellford, save and except deputy clerk treasurer, foremen, persons above the rank of foreman, office and clerical staff.” (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all office and clerical employees of the respondent in Campbellford, save and except deputy clerk treasurer, persons above the rank of deputy clerk treasurer.” (3 employees in unit). (*Having regard to the agreement of the parties*).



**1968-85-R:**United Food and Commercial Workers International Union, Local 633, (Applicant) v. Michael York (Toronto) Limited, (Respondent).

Unit:“all meat department employees of the respondent in Pickering, save and except manager of meat department, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (4 employees in unit). (*Having regard to the agreement of the parties*).

**1980-85-R:**Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Fibracan - A Division of Innopac Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #2:“all employees of the respondent at Anson Drive, Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.” (20 employees in unit). (*Having regard to the agreement of the parties*).

**1988-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Nick Ferraro & Sons Excavating Ltd., (Respondent).

Unit #1:“all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2:“all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

**2006-85-R:**Labourers' International Union of North America Local 183, (Applicant) v. Jane Wilson Towers Limited, (Respondent).

Unit:“all employees of the respondent at 180 Chalkfarm Drive, Metropolitan Toronto, save and except property manager, persons above the rank of property manager and employees in bargaining units for which any trade union held bargaining rights as of November 7, 1985.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2056-85-R:**International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Progressive Drywall and Interior Systems Inc., (Respondent).

Unit #1:“all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Clarity Note*).

Unit #2:“all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial,

commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit). (*Clarity Note*).

### Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**0989-85-R:**Service Employees International Union Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Consolidated Maintenance Services Ltd., (Respondent).

Unit: "all employees of the respondent employed at the Royal Bank Plaza and 20 King Street West in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and clerical staff and students employed during the school vacation period." (174 employees in unit).

Number of names of persons on revised voters' list	165
Number of persons who cast ballots	129
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	119
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	63
Number of ballots marked against applicant	50
Ballots segregated and not counted	10

**1546-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. G. W. Martin Lumber Limited - Eganville Division, (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit: "all employees of the respondent, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (54 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	54
Number of ballots marked in favour of applicant	43
Number of ballots marked in favour of intervener	11

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**0419-85-R:**Service Employees' Union Local 210 affiliated with Service Employees' International Union, (Applicant) v. Bruce Rest Home, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor Ontario, save and except professional medical staff, registered and graduate nurses, supervisors, persons above the rank of supervisor, and paramedical personnel." (30 employees in unit).

Number of names of persons on list as originally prepared by employer	30
Number of persons who cast ballots	26
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	6

**1343-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Essex, (Respondent).

Unit: "all employees of the respondent in the County of Essex regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and

except department heads, persons above the rank of department head, the executive secretary, secretary to the administrative assistant, secretary to the personnel co-ordinator, building maintenance supervisor, supervisor of central duplication, assistant engineer, road maintenance foreman, assistant road maintenance foreman, senior planner, supervisors in social and family services, operations manager, assistant operations manager, and secretary to administrator in social and family services.” (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		27
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		0

**1365-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Eddie Black’s Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in the Regional Municipality of Ottawa Carleton, save and except supervisors, persons above the rank of supervisor and office staff.” (75 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list		75
Number of persons who cast ballots	75	
Number of ballots marked in favour of applicant		40
Number of ballots marked against applicant		35

**1393-85-R:**Ontario Nurses’ Association, (Applicant) v. St. Francis Memorial Hospital, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit:“all registered and graduate nurses of the respondent employed in a nursing capacity at Barry’s Bay, save and except head nurses and persons above the rank of head nurse.” (21 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		18
Number of ballots marked in favour of intervener		0

**1522-85-R:**Hotel Employees Restaurant Employees Union Local 75, (Applicant) v. Cleary Auditorium and Memorial Convention Hall, (Respondent).

Unit:“all employees of the respondent in Windsor save and except supervisors, those above the rank of supervisor, personal secretaries, office and clerical staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (8 employees in unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		0

**1606-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Holiday Inn of Sault Ste. Marie of the Commonwealth Holiday Inns of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, secretary to the general manager and security staff.” (124 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		116
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Number of persons who cast ballots	101	
Number of ballots marked in favour of applicant		59
Number of ballots marked against applicant		42

**1620-85-R:**Canadian Union of Public Employees, (Applicant) v. Hillside Nursing Home Limited, (Respondent).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

Unit #2: "all employees of the respondent in the Township of Ellice, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except director, persons above the rank of director, clerical staff, and registered and graduate nurses." (13 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		3

### Applications for Certification Dismissed - No Vote Conducted

**3214-84-R:**Labourers' International Union of North America, Local 247, (Applicant) v. Dustbane Enterprises Ltd., (Respondent). (25 employees in unit).

**1119-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Maple Leaf Gardens, Limited, (Respondent). (8 employees in unit).

**1532-85-R:**Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Sarsan Holdings Limited, (Respondent). (2 employees in unit).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

**1842-85-R:**Service Employees International Union, Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Extendicare Health Services Inc./Highbourne, (Respondent). (74 employees in unit).

**1851-85-R:**Service Employees International Union Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Baycrest Centre for Geriatric Care, Baycrest Foundation, Baycrest Foundation Incorporated, (Respondent) v. Ontario Public School Employees Union, (Intervener). (45 employees in unit).

**1905-85-R:**Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL-CIO-CLC, (Applicant) v. Sydenham District Hospital, (Respondent) v. Group of Employees, (Objectors). (8 employees in unit).

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

**1980-85-R:**Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Fibracan - A Division of Innopac Inc., (Respondent) v. Group of Employees, (Objectors). (45 employees in unit).

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

## Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0582-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., (Applicant) v. A. G. Simpson Company Limited, (Respondent) v. Simpson Plant Council, (Intervener).

Unit: "all employees of the respondent at Port Perry, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (167 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		168
Number of persons who cast ballots	156	
Number of spoiled ballots		0
Number of ballots marked in favour of applicant		63
Number of ballots marked in favour of intervener		93
Ballots segregated and not counted		0

**1472-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Brown Window Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its plant at Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (22 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		11

**1562-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Mellows (Stoney Creek) Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

Unit #2: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders employed by the respondent in the City of Sault Ste. Marie for not more than 24 hours per week and students employed during the school vacation period, save and except assistant hostesses and persons above the rank of assistant hostess." (23 employees in unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		20

**1665-85-R:**United Steelworkers of America, (Applicant) v. Easy-Plan Furniture Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Pickering, save and except foremen, persons above the rank of foreman, office and sales staff." (57 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		61
Number of persons who cast ballots	59	
Number of ballots marked in favour of applicant		26
Number of ballots marked against applicant		32
Ballots segregated and not counted		1

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0869-84-R:**Ontario Secondary School Teachers' Federation, (Applicant) v. The Norfolk Board of Education, (Respondent).

**1461-85-R:**United Electrical, Radio and Machine Workers of Canada (UE), (Applicant) v. Bray Rivet & Machine Company Limited - and - Chelsea Engineered Parts Company Limited, (Respondents).

**1469-85-R:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Central Stampings Limited, (Respondent) v. Group of Employees, (Objectors).

**1595-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Bruno's Contracting (Thunder Bay) Limited, (Respondent) v. Employee, (Objector).

**1744-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Bay-Tower Homes Company Ltd., (Respondent).

**1756-85-R:**Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Petrolia, (Respondent).

**1829-85-R:**United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Jacmorr Manufacturing Limited, (Respondent).

**1880-85-R:**Labourers' International Union of North America, Local 1081, (Applicant) v. Drexler Construction Limited, (Respondent).

**1881-85-R:**United Electrical, Radio and Machine Workers of Canada (UE) and its Local 522, (Applicant) v. Bray Rivet & Machine Company Ltd. and Chelsea Engineered Parts Co. Ltd., (Respondents).

**1920-85-R:**Labourers' International Union of North America, Local 491, (Applicant) v. Michael Monteith, (Respondent).

**1933-85-R:**United Steelworkers of America, (Applicant) v. Johnson Matthey Limited, (Respondent).

**1939-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Mar Tacc Construction, (Respondent).

**1970-85-R:**Canadian Union of Public Employees, (Applicant) v. Oxford County Roman Catholic Separate School Board, (Respondent).

**2075-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. Jack Barbosa Limited, (Respondent).

**2078-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Marshall Construction Limited, (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1028-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 93 and 1988, (Applicant) v. 137306 Canada Inc. carrying on business as Voyageur Development, and Voyageur Forming Inc.,



(Respondents) v. Formwork Council of Ontario and Labourers' International Union of North America Local 527, (Intervener). (*Granted*).

**1540-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. M.B.L. International Contractors Incorporated, Marentette Brothers (Bros.), Tecumseh Road Builders and the Countryside Farms Limited, (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**0275-84-R:**London & District Service Workers' Union, Local 220, (Applicant) v. Caressant Care Nursing Home of Canada Limited, (Respondent). (*Granted*).

**0337-85-R:**Retail, Wholesale and Department Store Union Local 440, (Applicant) v. Ault Dairies, Division of Ault Foods Limited, (Respondent) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647, affiliated with the I.B. of T., C., W. and H. of A., (Intervener). (*Granted*).

**0686-85-R:**Brewery, Malt and Soft Drink Workers, Local 304, (Applicant) v. Halton Crushed Stone Ltd., (Respondent). (*Withdrawn*).

**1026-85-R:**Millwright District Council of Ontario on its own behalf and on behalf of Local 2309, (Applicant) v. Norm's Erection Services Inc. and Associated Installers Limited, (Respondent). (*Withdrawn*).

## UNION SUCCESSOR RIGHTS

**1679-85-R:**Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Goldcrest Furniture Ltd., (Respondent). (*Granted*).

**1680-85-R:**Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Sealy Upholstery Canada Inc., (Respondent). (*Granted*).

**1813-85-R:**Graphic Communications International Union, Local 510-C, London, (Applicant) v. Somerville Belkin Industries Limited, (Respondent). (*Granted*).

**1871-85-R:**Office & Professional Employees International Union, (Applicant) v. Home Care Employees' Association, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0554-85-R:**Unionized Office Employees of Christie Brown & Co. (Nabisco Brands Ltd.) (Office and Professional Employees International Union - Local 131), (Applicants) v. Office & Professional Employees International Union, Local 131, (Respondent) v. Christie Brown & Co., Division of Nabisco Brands Ltd., (Intervener) v. Group of Employees, (Objectors). (61 employees in unit). (*Dismissed*).

**1112-85-R:**Douglas Linfield, (Applicant) v. United Food and Commercial Workers A.F.L.-C.I.O.-C.L.C., (Respondent).

Unit: "all employees of Sunsqueeze Juices Inc., at Guelph, Ontario save and except forepersons and those above the rank of foreperson, office and sales staff." (23 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		22
Number of persons who cast ballots	19	
Number of ballots marked in favour of respondent		3
Number of ballots marked against respondent		15
Number of spoiled ballots		1

**1124-85-R:** Margaret Monck, (Applicant) v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America (U.A.W.) and Local 1474 (U.A.W.), (Respondent) v. Collingwood Fabrics Inc., (Intervener).

Unit: "all employees of the intervener at Collingwood, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, and guards." (10 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	12	
Number of ballots marked in favour of respondent		5
Number of ballots marked against respondent		7

**1258-85-R:** Employees of Steel Cylinder Manufacturing Ltd., (Applicant) v. The Teamsters Union, Local 880, (Respondent).

Unit: "all employees of Steel Cylinder Manufacturing Limited at Tilbury, Ontario, save and except supervisor, those above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	18	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		16

**1348-85-R:** Douglas Burke, (Applicant) v. United Electrical, Radio and Machine Workers of America (UE) and its Local 517, (Respondent) v. The Northside Dairy Limited, (Intervener).

Unit: "all employees of The Northside Dairy Limited located at 871 Niagara Street North, Welland, Ontario, save and except route supervisors, foremen, and persons above the rank of route supervisors or foremen, and office staff." (15 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	14	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		13

**1557-85-R:** Elaine Miller, (Applicant) v. United Foods and Commercial Workers Union, (Respondent). (70 employees in unit). (*Withdrawn*).

**1696-85-R:** Gary Hebb, (Applicant) v. Retail, Wholesale and Department Store Union, Local 414, (Respondent) v. Sylru Ltd., carrying on business as Crosstown Department Store, (Intervener). (44 employees in unit). (*Granted*).

**1706-85-R:** Fiona Duncanson, (Applicant) v. Retail, Wholesale and Department Store Union, (Respondent). (12 employees in unit). (*Granted*).

**1746-85-R:** Donna Welk, (Applicant) v. United Steelworkers of America, (Respondent). (12 employees in unit). (*Dismissed*).

**1945-85-R:** Sheila Devlin, (Applicant) v. Hotel Employees and Restaurant Employees Union, Local 75, (Respondent) v. Beefeater Restaurant, (Intervener). (25 employees in unit). (*Granted*).

**1974-85-R:** Elmira Refiners Limited, R. R. #3, Port Colborne, Ont., (Applicant) v. Bakery, Confectionery & Tobacco Workers Union, Local 264, (Respondent). (8 employees in unit). (*Withdrawn*).

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**2577-83-M:** The Little Falls Dining Room, John the Sportsman Restaurant, Rockton Hotel, Valenca Restaurant, Atikokan Hotel, Steep Rock Inn, (Employers) v. Hotel Employees Restaurant Employees Union, Local 75, (Trade Union). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**1771-85-U:** The Ontario Produce Company, The Oshawa Foods Division of The Oshawa Group Limited, (Applicant) v. Mario Passaretti et al, (Respondents). (*Withdrawn*).

**1897-85-U:** Highland Beverages Limited, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Robert Hill, Jim Booth et al, (Respondents). (*Withdrawn*).

**2024-85-R:** Croydon Furniture Systems Inc., (Applicant) v. United Steelworkers of America, Local 5019, J. Barnett, C. Harper, R. Barnett and E. Kinch, (Respondents). (*Withdrawn*).

**2025-85-U:** Croydon Furniture Systems Inc., (Applicant) v. H. Typhair et al, (Respondents). (*Withdrawn*).

**2097-85-U:** McDonnell Douglas Canada Ltd., (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) and Local 1967, William B. Patrick and Munir A. Khalid, (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

**1929-85-U:** Canadian Union of Restaurant and Related Employees, Local 88 (AFL-CIO-CLC), (Applicant) v. O'Tooles Food Corporation c.o.b. O'Tooles Roadhouse Restaurant (Barrie), (Respondent). (*Dismissed*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2778-84-U:** Canadian Union of Public Employees, (Complainant) v. Extendicare Health Services Inc., (Respondent). (*Granted*).

**3117-84-U:** John Filion, (Complainant) v. Southern Ontario Newspaper Guild, (Respondent) v. Toronto Star Newspapers Limited, (Intervener). (*Dismissed*).



**0059-85-U:**Ricardo I. Persaud, (Complainant) v. Service Employees International Union, Local 204, (Respondent) v. The Wellesley Hospital, (Interested Party). (*Dismissed*).

**0438-85-U:**United Steelworkers of America, (Complainant) v. Antique Building Supplies Ltd. c.o.b. as Toronto Fabricating Co., (Respondent). (*Granted*).

**0516-85-U:**United Steelworkers of America, (Complainant) v. Mid-Canada Mill Marine Works, (Respondent). (*Dismissed*).

**0699-85-U:**Service Employees Union, Local 210 affiliated with Service Employees International Union AFL-CIO-CLC, (Complainant) v. Casey's Restaurant, (Respondent). (*Withdrawn*).

**0754-85-U:**Edward R. Guhl, (Complainant) v. Niagara Peninsula Printing and Graphic Communications Union Local 425 G.C.I.U., (Respondent) v. G. Lyon's Litho Limited, (Intervener). (*Dismissed*).

**0848-85-U:**Royal Conservatory of Music Faculty Association, (Complainant) v. Governing Council of the University of Toronto (Royal Conservatory of Music), (Respondent). (*Granted*).

**0870-85-U:**Frances Manion, Brad Gaull, Bob Derrington, Brian Wayte, David Stacey, Mike Borenko, William Salisbury, Tom Haynes, Sterling Barker, Erika Macdonald, Shirley Sagriff, Norma Pringle, Joanne Whalen, Earle Jaynes, James Saunders, Brian Hadder, Douglas Moore, Joseph Calderone, Dorothea Frattaroli, John McPhee, Marlene J. Pym, Joan Rait, Dorothy Ritchie, Siegfried Huber, Eileen Caesar, Helen Shaw, William Batchelor, Josephine Marino, Darlene Milligan, Debbie Sinclair, Robert G. Arscott, Joseph Sgovio, Gus Calderone, Anne Moskaluk, Karen McGrath, on their own behalf and on behalf of all employees of Dominion Stores Limited in retail stores not purchased by the Respondent, the Great Atlantic & Pacific Tea Company Limited who are covered by a collective agreement entered into between the Retail, Wholesale & Department Store Union, AFL, CIO, CLC and its Locals 414 and 465, (Complainants) v. Retail, Wholesale & Department Store Union, Locals 414 and 465, Dominion Stores Limited and the Great Atlantic & Pacific Tea Company Limited, (Respondents). (*Withdrawn*).

**0957-85-U;1614-85-U:**Spar Professional and Allied Technical Employees Association, Metropolitan Toronto, (Complainant) v. Spar Aerospace Limited, (Respondent). (*Terminated*).

**1144-85-U:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC), (Complainant) v. 573852 Ontario Inc., (c.o.b. O'Tooles Road House Restaurant), (Respondent). (*Withdrawn*).

**1184-85-U:**Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. General Metal Products of Windsor Limited, (Respondent). (*Granted*).

**1315-85-U:**Ontario Public Service Employees Union, (Complainant) v. Alan R. Barker Ambulance Service, (Respondent). (*Withdrawn*).

**1341-85-U:**Mr. Saviour Borg, (Complainant) v. American Federation of Grain Millers-Local 230 & General Mills of Canada, (Respondent). (*Withdrawn*).

**1357-85-U:**Jeanette Kirkpatrick, (Complainant) v. The Corporation of the Town of Oakville and The Canadian Union of Public Employees, Local 1329, (Respondents). (*Dismissed*).

**1379-85-U:**Bernard Bascombe, Ed Munro, Verna Innis, Nawshad Teja, Joel Armoogan, William Hart, and other employees of Consumers' Distributing Co. Ltd., listed in Appendix "A" to the complaint,

(Complainants) v. Consumers' Distributing Co. Ltd., and certain of its employees listed in Appendix "B" to the complaint; and Teamsters Local Union 419 and officials and agents of the union as listed in Appendix "C" to the complaint; and Charles Thibault, President, Teamsters Joint Council 52, (Respondents). (*Dismissed*).

**1386-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Fidnam (Canada) Limited, (Respondent). (*Withdrawn*).

**1419-85-U:**Jose Matos, (Complainant) v. Maple Lodge Farms & United Food Commercial Workers, (Respondents). (*Dismissed*).

**1422-85-U;1668-85-U;1669-85-U:**Hotels, Clubs, Restaurants, Taverns, Employees' Union, Local 261, (Complainant) v. Service Star Building Cleaning Inc., Claire Pariseau and Peter Potetsianakis, (Respondents). (*Withdrawn*).

**1425-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Fidnam (Canada) Limited, (Respondent). (*Withdrawn*).

**1427-85-U:**John Paul Morrison, (Complainant) v. Energy & Chemical Workers Union (E.C.W.U. Local 8), (Respondent). (*Withdrawn*).

**1429-85-U:**Service Employees International Union, Local 204 affiliated with S.E.I.U., AFL-CIO-CLC, (Complainant) v. Dalhousie Retirement Home Ltd., (Respondent). (*Granted*).

**1432-85-U:**Ontario Public Service Employees Union, (Complainant) v. St. Leonard's House London, (Respondent). (*Withdrawn*).

**1462-85-U:**Felisbina Matos, (Complainant) v. United Food and Commercial Workers International Union AFL:CIO:CLC:, on behalf of Local 1105P United Food and Commercial Workers International Union Region 18, AFL:CIO:CLC, (Respondent). (*Dismissed*).

**1475-85-U:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC), (Complainant) v. 573852 Ontario Inc. (c.o.b. O'Tooles Roadhouse Restaurant), (Respondent). (*Withdrawn*).

**1485-85-U:**United Steelworkers of America, (Complainant) v. John T. Hepburn, Limited, (Respondent). (*Dismissed*).

**1490-85-U:**Canadiana Textiles Screen Print Limited, (Complainant) v. United Steelworkers of America, (Respondent). (*Withdrawn*).

**1498-85-U:**Miguel Leal Monteiro, 114 Wallace Ave., Toronto, Ontario, M6H 1X5, (Complainant) v. Toronto Paper Fibre, 1299 St. Mary's Ave., Mississauga, Ontario, (Respondent). (*Withdrawn*).

**1501-85-U:**United Steelworkers of America, (Complainant) v. OE Inc. (Office Equipment Company of Canada), (Respondent). (*Withdrawn*).

**1502-85-U:**United Steelworkers of America, (Complainant) v. Lanark Sheet Metal Works Ltd., (Respondent). (*Withdrawn*).

**1516-85-U:**Teamsters Local Union No. 419, (Complainant) v. Consumers Distributing Co. Ltd., (Respondent). (*Withdrawn*).

**1534-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Concorde Maintenance Limited, (Respondent). (*Withdrawn*).

**1535-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Concorde Maintenance Limited, (Respondent). (*Withdrawn*).

**1543-85-U:**Brewery, Malt and Soft Drink Workers, Local 304, Joe Kalynuik and Cecil Cameron, (Complainants) v. Orange Roof of Canada Ltd., also known as Howard Johnson's Motor Lodge, (Respondent). (*Withdrawn*).

**1553-85-U:**Unrepresented Laid-off Steelworkers, (Complainants) v. Local 1005 USWA, (Respondent). (*Withdrawn*).

**1554-85-U:**International Beverage Dispensers' and Bartenders' Union, Local 280, (Complainant) v. The Carlton Inn (Toronto) Inc., (Respondent). (*Withdrawn*).

**1583-85-U:**Mary V. Dlutek, (Complainant) v. Consumers Glass Company, Aluminum, Brick & Glass Workers International Union AFL-CIO-CLC Local 200G, (Respondents). (*Dismissed*).

**1584-85-U:**Halina Bortkiewicz, (Complainant) v. Consumers Glass Company, Aluminum, Brick & Glass Workers International Union AFL-CIO-CLC Local 200G, (Respondents). (*Dismissed*).

**1597-85-U:**International Union of Operating Engineers, Local 793, (Complainant) v. Bruno's Contracting (Thunder Bay) Limited, (Respondent). (*Terminated*).

**1613-85-U:**Murray J. Haley, (Complainant) v. Falconbridge Limited, and Sudbury Mine Mill and Smelter Worker's Union Local 598, (Respondents). (*Withdrawn*).

**1645-85-U:**Bakery, Confectionery and Tobacco Workers International Union, Local 264, (Complainant) v. Bakerite Foods Inc., (Respondent). (*Withdrawn*).

**1667-85-U:**Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. MSL Properties Limited (c.o.b. as the Roehampton Hotel, 808 Mount Pleasant Road, Toronto, Ontario, M4P 2L2), (Respondent). (*Withdrawn*).

**1700-85-U:**Canwood Lachute Employees' Association, (Complainant) v. Canwood Lachute Ltd., (Respondent). (*Withdrawn*).

**1701-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1716-85-U:**The Canadian Union of Public Employees and its Local 2380, (Complainant) v. The Corporation of the City of Barrie, (Respondent). (*Withdrawn*).

**1719-85-U:**Walter Sykes, (Complainant) v. Rowntree Mackintosh (Canada) Ltd., (Respondent). (*Dismissed*).

**1725-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1735-85-U:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Highland Beverages Limited, (Respondent). (*Withdrawn*).



**1738-85-U:**Giuseppe Cara, (Complainant) v. Ontario Catholic Occasional Teachers' Association, (Respondent). (*Withdrawn*).

**1754-85-U:**United Steelworkers of America, (Complainant) v. Terra Footwear Ltd., (Respondent). (*Withdrawn*).

**1758-85-U:**Ontario Public Service Employees Union, (Complainant) v. St. Leonard's House London, (Respondent). (*Withdrawn*).

**1759-85-U:**Rosita Boodhoo, (Complainant) v. North York General Hospital, (Respondent). (*Dismissed*).

**1762-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1763-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1764-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1765-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1773-85-U:**Ready-Mix, Building, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230, (Complainant) v. Simcoe Block (1979) Limited, (Respondent). (*Withdrawn*).

**1805-85-U:**Canadian Union of Operating Engineers and General Workers, (Complainant) v. Blue Line Taxi Company Limited, (Respondent). (*Withdrawn*).

**1806-85-U:**Canadian Union of Operating Engineers and General Workers, (Complainant) v. Blue Line Taxi Company Limited, (Respondent). (*Withdrawn*).

**1812-85-U:**The Electrical Power Systems Construction Association and Ontario Hydro, (Complainants) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 of the International Association of Bridge, Structural and Ornamental Ironworkers, and Allan MacIsaac, (Respondent). (*Withdrawn*).

**1819-85-U:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC), (Complainant) v. O'Tooles Roadhouse Restaurant, (Respondent). (*Withdrawn*).

**1827-85-U:**Toronto Typographical Union Local 91, (Complainant) v. Fitzhenry-Whiteside Ltd., (Respondent). (*Withdrawn*).

**1830-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1831-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Ltd., (Respondent). (*Withdrawn*).

**1832-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1833-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Ltd., (Respondent). (*Withdrawn*).

**1860-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1861-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1862-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1863-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1864-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1865-85-U:**United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1870-85-U:**Arthur A. Duck, (Complainant) v. The Ontario Public Service Employees Union, (Respondent). (*Dismissed*).

**1882-85-U:**United Electrical, Radio and Machine Workers of Canada (UE) and its Local 522, (Complainant) v. Bray Rivet & Machine Company Ltd. and Chelsea Engineered Parts Co. Ltd., (Respondents). (*Withdrawn*).

**1890-85-U:**Ontario Public Service Employees Union, (Complainant) v. St. Leonard's House London, (Respondent). (*Withdrawn*).

**1900-85-U:**Fleet Industries, a division of Fleet Aerospace Corp., (Complainant) v. International Association of Machinists and Aerospace Workers and its Local 939, (Respondent). (*Withdrawn*).

**1908-85-U:**The Association of Allied Health Professionals: Ontario, (Complainant) v. The Religious Hospitallers of St. Joseph of the Hotel Dieu of Kingston, (Respondent). (*Withdrawn*).

**1924-85-U:**Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88 (AFL-CIO-CLC), (Complainant) v. O'Tooles Roadhouse Restaurant, (Respondent). (*Withdrawn*).

**1925-85-U:**Canadian Union of Restaurant and Related Employees and Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union Local 88, (Complainant) v. Swiss Chalet Employers Association, Cara Operations Ltd., and Allan Morrow, (Respondent). (*Withdrawn*).

**1971-85-U:**United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1976-85-U:**Graphic Communications International Union, Local 500-M, (Complainant) v. Holway Packaging Limited & Bill Ellis, (Respondents). (*Withdrawn*).

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**1975-85-U:**Graphic Communications International Union, Local 500-M, (Applicant) v. Holway Packaging Limited and Bill Ellis, (Respondents). (*Withdrawn*).

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**1527-85-M:**Janice Anne Karr, (Applicant) v. London & District Service Workers' Union, Local 220, (Respondent Trade Union) v. Craigholme Nursing Home, (Respondent Employer). (*Dismissed*).

**1674-85-M:**James Robert Cooper, (Applicant) v. Southwestern Ontario Textile Joint Board of the Amalgamated Clothing and Textile Workers' Union, (Respondent Trade Union) v. Bonnie Stuart Shoes Limited, (Respondent Employer). (*Dismissed*).

**1715-85-M:**Franziska Zeitler, (Applicant) v. The Amalgamated Clothing & Textile Workers Union, (Respondent Trade Union) v. Bonnie Stuart Shoes Limited, (Respondent Employer). (*Granted*).

**2037-85-M:**Betty Siddall, (Applicant) v. London & District Service Workers, Local 220, (Respondent Trade Union) v. Craigholme Nursing Home, (Respondent Employer). (*Dismissed*).

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**1675-85-M:**The Corporation of the City of Barrie, (Applicant) v. The Canadian Union of Public Employees, Local 2380, (Respondent). (*Terminated*).

**1814-85-M:**U.A.W. Local 195, (Applicant) v. Central Stampings Limited, (Respondent). (*Withdrawn*).

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**0615-85-OH:**Mark McCarroll, (Complainant) v. Precious Plate Limited, (Respondent). (*Withdrawn*).



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**1020-85-EP:**Karel Kraan, (Complainant) v. Custom Muffler Ltd., (Respondent) v. Minister of the Environment, (Intervener). (*Terminated*).

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**2499-84-M:**United Brotherhood of Carpenters and Joiners of America, Local #494, (Applicant) v. Ellis-Don Ltd., (Respondent). (*Withdrawn*).

**2679-84-M:**International Association of Bridge, Structural and Ornamental Ironworkers, (Applicant) v. Ontario Hydro, (Respondent). (*Withdrawn*).

**2861-84-M:**International Union of Elevator Constructors, Local #50, (Applicant) v. Montgomery Elevator Company, (Respondent). (*Dismissed*).

**0896-85-M:**United Brotherhood of Carpenters and Joiners of America, Locals 93 and 1988, (Applicant) v. Voyageur Development, (Respondent). (*Granted*).

**1025-85-M:**Millwright District Council of Ontario on its own behalf and on behalf of Local 2309, (Applicant) v. Norm's Erection Services Inc. and Associated Installers Limited, (Respondent). (*Withdrawn*).

**1039-85-M:**Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. George Klein c.o.b. as Columbia Interior Contracting, E.G.N. Construction Services Ltd. c.o.b. as Columbia Interior Contractors, (Respondents). (*Granted*).

**1198-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. J. C. Sulphur Construction Ltd., (Respondent). (*Withdrawn*).

**1199-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. B.B.S. Construction Limited, (Respondent). (*Withdrawn*).

**1200-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. M. P. Lundy Construction Ltd., (Respondent). (*Withdrawn*).

**1435-85-M:**Local 200 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Bob Cinkant Painting Ltd., (Respondent). (*Granted*).

**1581-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 736, (Applicant) v. Paikin Steel Products Limited, (Respondent). (*Withdrawn*).

**1631-85-M:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, (Applicant) v. Global Heat International, (Respondent). (*Withdrawn*).

**1649-85-M:**The Metropolitan Toronto Apartment Builders Association on behalf of Belmont Construction Co. Ltd., (Applicant) v. The Labourers' International Union of North America, Local 183, (Respondent). (*Granted*).

**1670-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Donald Walter Excavating, (Respondent). (*Granted*).

**1729-85-M:**LIUNA Local 597, (Applicant) v. George & Asmussen Limited, (G & A Masonry), (Respondent). (*Withdrawn*).

**1730-85-M:**LIUNA Local 1089, (Applicant) v. Jafco Construction Ltd., (Respondent). (*Withdrawn*).

**1766-85-M:**Labourers' International Union of North America, Local 506, (Applicant) v. Ferracon Construction Limited, (Respondent). (*Granted*).

**1777-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Andrew Paving and Engineering Limited, (Respondent). (*Withdrawn*).

**1778-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Dawn Enterprises Limited, (Respondent). (*Withdrawn*).

**1781-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Via Construction Limited, (Respondent). (*Withdrawn*).

**1783-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Sivi Construction Limited, (Respondent). (*Withdrawn*).

**1784-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. L.J.S. Construction Limited, (Respondent). (*Withdrawn*).

**1785-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Form Tech Limited and/or 567557 Ontario Limited, (Respondent). (*Withdrawn*).

**1787-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Dilsa Construction and Engineering Limited, (Respondent). (*Withdrawn*).

**1788-85-M:**Carpenters' District Council of Toronto and Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

**1789-85-M:**Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Antinori Building Contractor Inc., (Respondent). (*Withdrawn*).

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**1846-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Wall Systems of Canada Ltd., (Respondent). (*Withdrawn*).

**1856-85-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. Cross Supplies and Paving Inc., (Respondent). (*Withdrawn*).

**1884-85-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. Abba Concrete & Servicing Limited, (Respondent). (*Withdrawn*).

**1894-85-M:**Labourers' International Union of North America, Local 527, (Applicant) v. Ellis Don Limited, (Respondent). (*Withdrawn*).

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**1915-85-M:**Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. M. K. Drywall Ltd., (Respondent). (*Withdrawn*).

**1922-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Mar-San Excavating Limited, (Respondent). (*Granted*).

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**1973-85-M:**International Association of Heat and Frost Insulators & Asbestos Workers and the International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, (Applicant) v. R. G. Watters & Co. Ltd., (Respondent). (*Granted*).

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**2013-85-M:**The International Brotherhood of Electrical Workers Local Union 894, (Applicant) v. Morris Electric Limited, (Respondent). (*Granted*).

**2031-85-M:**Carpenters' District Council of Toronto and Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. A. C. Joe Bancheri Carpentry, (Respondent). (*Granted*).

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*Ontario Labour Relations Board,  
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A Monthly Series of Decisions from the  
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*Ontario Labour Relations Board,  
400 University Avenue,  
Toronto, Ontario  
M7A 1V4*

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